TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1893.

No. 152.

ROBERT A. CHESEBROUGH, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 30, 1893.

(18,719.)

(18,719.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 491.

ROBERT A. CHESEBROUGH, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Statement	1	1
Writ of error	2	1
Proof of service of writ	3	2
Citation	4	2
Proof of service of citation	5	2
Clerk's certificate	6	2
Petition and proof of service of petition	7	3
Demurrer	13	6
Order sustaining demurrer and dismissing petition	14	7
Judgment	15	7
Petition for writ of error and proof of service	16	8
Bond and approval thereof and proof of service	17	8
Assignment of errors and proof of service	19	9

1 United States District Court, Southern District of New York.

ROBERT H. CHESEBROUGH, Claimant in Error,
against
THE UNITED STATES.

Statement.

1902.
May 23. Petition filed.
May 27. Demurrer filed.
June 12. Order sustaining demurrer and dismissing petition entered.
June 13. Judgment on demurrer entered.
July 3. Writ of error allowed.
July 10. Petition for writ of error filed.
" " Writ of error and proof of service thereof filed.
" " Citation and proof of service thereof filed.
Jul- 10. Bond on writ of error filed.
Do. Assignment of errors filed.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judge of the district court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, or some of you, between Robert A. Chesebrough, claimant, against The United States, a manifest error hath happened, to the great damage of the said Robert A. Chesebrough, as is said and appears by his petition, we being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the 21st day of July next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 3d day of July, in the year of our Lord, one thousand nine hundred and two, and of the Independence of the United States the one hundred and twenty-sixth.

{Seal District Court of the United States, Southern District of N. Y.}

THOS. ALEXANDER,
Clerk U. S. District Court.

The foregoing writ is allowed.

GEO. B. ADAMS,
U. S. District Judge.

3 [Endorsed:] 4–117 Robert A. Chesebrough, claimant in error, against The United States. Writ of error. A copy of the within paper has been this day received at this office, Jul- 10 1902 Henry L. Burnett, U. S. attorney. P. U. S. district court Filed Jul- 10 1902.

4 By the Honorable George B. Adams, judge of the United States district court for the southern district of New York, to the United States, Greeting:

You are hereby cited and admonished to be and appear before the United States Supreme Court to be holden at the city of Washington on the 21st day of July, 1902, pursuant to a writ of error filed in the office of the clerk of the district court of the United States for the southern district of New York, wherein Robert A. Chesebrough is the claimant against the United States, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district above named, this 3d day of July, in the year of our Lord one thousand nine hundred and two and of the Independence of the United States the one hundred and twenty-sixth.

GEO. B. ADAMS,
Judge of the District Court of the United States for the Southern District of New York.

5 [Endorsed:] 4–117. Supreme Court of the United States. Robert A. Chesebrough, claimant, against The United States. Citation. Coudert Brothers, att'ys for claimant, 71 Broadway, New York. A copy of the within paper has been this day received at this office. Jul- 10, 1902. Henry L. Burnett, U. S. attorney. P. U. S. district court. Filed Jul- 10, 1902.

6 UNITED STATES OF AMERICA,
Southern District of New York, } ss:

I, Thomas Alexander, clerk of the district court of the United States of America for the southern district of New York, do hereby certify that the writings annexed to this certificate have been compared by me with their originals on file and remaining of record in my office; that they are correct transcripts therefrom and of the whole of the said originals.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, this 21st day of October, in the year of our Lord one

thousand nine hundred and two, and of the Independence of the said United States the one hundred and twenty-seventh.

{ Seal District Court of the United States, Southern District of N. Y. }

THOS. ALEXANDER, *Clerk.*

7 In the District Court of the United States for the Southern District of New York.

ROBERT A. CHESEBROUGH, Claimant, *against* THE UNITED STATES. } Petition No. —.

Action against United States under act of March 3rd, 1887.

Robert A. Chesebrough, the petitioner above named, by Coudert Brothers, Esq., his attorneys, for his petition against the United States, respectfully shows to the court and alleges:

I. That at all the times hereinafter mentioned the petitioner was and he now is a citizen of the United States and of the State of New York, residing within and an inhabitant of the southern district of New York.

II. That on the 27th day of May, in the year 1900, the petitioner was and had, for a long time prior to the year 1898, been the owner in fee-simple of certain real estate and premises within the borough of Manhattan, city of New York, commonly known as Nos. 21–24 State street, and on or about the 28th day of May, 1900, he made and entered into an agreement with the Chesebrough Building Company, a corporation organized under the laws of the State of New York, under which he, the said petitioner, agreed to convey to the said corporation the said real estate and premises by a deed of conveyance in common form with the usual covenants, and to execute and deliver such deed on the fifth day of June, in the year 1900, for and in consideration of the sum of six hundred thousand dollars ($600,000.00) of the capital stock of said company, being six thousand (6,000) shares of a par value of one hundred dollars ($100) each.

8 That thereafter pursuant to said agreement and on the fifth day of June, in the year 1900, the petitioner made, executed and delivered to the said corporation a deed of conveyance of the said real estate and premises, in common form with the usual covenants, a true copy of which is hereto annexed, made a part of this petition and marked "Exhibit A," and received from said corporation the stock above stated as the consideration named in the said agreement.

III. That under the common and statute law of the State of New York, petitioner could not sell or convey said real estate and give a valid title to the purchaser without making, executing and delivering a deed of conveyance thereof, and the petitioner's right to sell and dispose of said real estate was an essential element of his right of ownership in fee-simple thereof.

IV. That at the time of the execution and delivery of such deed there was in force the act of Congress of June 13th, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes," which act provided in part as follows:

"SEC. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied collected and paid, for and in respect of the several bonds, debentures or certificates of stock, and of indebtedness, and other documents, instruments, matters and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign or issue the same, or for whose use or benefit the same shall be made, signed or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified
9 or set forth in the said schedule."

"SCHEDULE A."

"Conveyance: deed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers or any other person or persons, by his, her or their direction, when the consideration or value exceeds one hundred dollars and does not exceed five hundred dollars, fifty cents; and for each additional five hundred dollars or fractional part thereof in excess of five hundred dollars, fifty cents."

"SEC. 7. That if any person or persons shall make, sign or issue, or cause to be made, signed or issued, any instrument, document, or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than one hundred dollars, at the discretion of the court, and such instrument, document or paper, as aforesaid, shall not be competent evidence in any court."

And that such law being in force the Chesebrough Building Company, as was known to petitioner, was unwilling to accept the said deed of conveyance unless and until petitioner had placed thereon the stamps required by the aforesaid act, and that petitioner under compulsion of said law, and in order to receive from the purchaser the shares of stock named as the consideration for such conveyance, and in order to entitle such deed to be recorded under the provisions of said act, and to be received as evidence in the Federal courts, as therein provided and in order to enable the petitioner to fulfill his aforesaid
10 contract with said Chesebrough Building Company to make, execute and deliver to said company a good and sufficient deed of conveyance of said real estate and premises, and in order to give to said company a good and clear title to said real estate and

premises, free from doubt, did purchase from Charles H. Treat, the United States collector of internal revenue for the second district of New York, and place upon the said deed of conveyance stamps to the amount of six hundred dollars ($600) the proceeds of sale of which stamps your petitioner believes were thereupon by said collector paid over to the United States as required by law, and said moneys are now held by the United States.

V. That prior to the institution of this action, the petitioner, pursuant to the laws of the United States and the regulations of the Treasury Department in such case made and provided, did make, a written application to the United States Commissioner of Internal Revenue within two years from the date of the purchase of said stamps, to wit, on the ninth day of January, 1902, for the refunding of the amount so paid by him for stamps as aforesaid, which application was by said Commissioner thereupon, and prior to the commencement of this action, denied.

VI. That, as petitioner is advised by counsel, the portions of said War-revenue law of June 13th, 1898, under which the petitioner was compelled to pay to the United States the said tax or duty in the purchase of said stamps are unconstitutional and void and in violation of the following clauses of the Constitution of the United States, to wit, the third clause of the second section of the first article, which provides:

"Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons including those bound
11 to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons;"

as amended by section 2 of the XIVth amendment, which provides:

"Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed;"

and the first clause of the eighth section of the first article which provides:

"1. The Congress shall have power to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;"

and the fourth clause of the ninth section of the first article which provides:

"No capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

In that the duty or tax so provided in the aforesaid portions of said act of Congress to be paid through the purchase and affixing of documentary stamps on all deeds of conveyance of real estate is a

direct tax within the meaning of the provisions of the clauses and sections of the Constitution above referred to.

Wherefore, the petitioner demands judgment for the sum of six hundred ($600.00) dollars, with the costs of this action, and all proper relief in the premises.

COUDERT BROTHERS,
Attorneys for Petitioner, No. 71 Broadway, Borough of Manhattan, New York City, N. Y.

12 STATE OF NEW YORK, }
County of New York, } ss.:

Robert A. Chesebrough, being duly sworn, says, that he is the petitioner herein; that he has read the foregoing petition subscribed by him and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

ROB'T A. CHESEBROUGH.

Sworn and subscribed to before me, this 18th day of February, 1902.

CHAS. FRIEDENBERG,
[SEAL.] *Notary Public, N. Y. Co.*, #73.

Endorsed: Petition. Filed May 23, 1902. A copy of the within petition has been this day received at this office March 24, 1902 Henry L. Burnett, U. S. attorney.

13 District Court of the United States, Southern District of New York.

ROBERT A. CHESEBROUGH, Claimant, }
against
THE UNITED STATES. }

The United States above named by its attorney, Henry L. Burnett, demurs to the petition of the above-named claimant herein on the ground,

First. That said petition does not state facts sufficient to constitute a claim on the part of the claimant against the United States.

Wherefore the United States demands that said petition be dismissed with costs.

HENRY L. BURNETT,
United States Attorney, Attorney for Plaintiffs.

Office & P. O. address, Room 50, P. O. building, New York city.

Endorsed: Demurrer—Filed May 27, 1902.

14 At a stated term of the United States district court held in and for the southern district of New York, at the United States court and post-office building, in the borough of Manhattan, in the city of New York on the 12 day of June, 1902,

Present: Hon. George B. Adams, district judge.

ROBERT A. CHESEBROUGH, Complainant,
vs.
THE UNITED STATES.

This cause having been regularly brought on for argument upon the issues of law formed by the complaint of the plaintiff, and the demurrer of the defendant at a stated term of this court held by me in and for the southern district of New York, at the United States court and post-office building in the borough of Manhattan, city of New York, on the 12 day of June, 1902, and the said cause having been duly submitted to Henry L. Burnett, for the defendant, in support of the demurrer, and by Coudert Brothers, for the plaintiff, in opposition to said demurrer, it is on motion of Henry L. Burnett, United States attorney for the southern district of New York, and attorney for the defendant,

Ordered, adjudged and decreed that the said demurrer be and the same hereby is sustained, and that the petition herein be, and the same hereby is dismissed.

GEORGE B. ADAMS.

Assented to as to form.
COUDERT BROTHERS,
Att'ys for Claimant.

Endorsed: Order directing judgment. Filed June 12, 1902.

15 At a stated term of the district court of the United States, held in and for the southern district of New York, in the Post-office building in the borough of Manhattan, in the city of New York, on the 12th day of June, 1902,

Present: Hon. George B. Adams, district judge.

ROBERT A. CHESEBROUGH, Plaintiff,
vs.
THE UNITED STATES, Defendant.

This action having been brought on for argument before the Honorable George B. Adams, district judge, at a stated term of this court, held on the 12th day of June, 1902, at the United States court and post-office building, in the borough of Manhattan, city of New York, the plaintiff appearing by Coudert Brothers, attorneys for petitioners, and the said court, on motion of Henry L. Burnett, having filed an order dated the 12th day of June, 1902, sustaining said demurrer, and ordered that final judgment be directed for the defendant,

Now, on motion of Henry L. Burnett, United States attorney for the southern district of New York, attorney for defendant, it is

Ordered, adjudged and decreed that the said demurrer be and the same hereby is sustained, and that the petition herein be and the same hereby is dismissed.

Judgment signed the 12th day of June, 1902, at 10.38 o'clock a. m.

GEO. B. ADAMS.

Assented to as to form.
COUDERT BROTHERS,
Attorneys for Claimant.

Endorsed: Judgment. Filed June 12, 1902.

16 United States District Court for the Southern District of New York.

ROBERT A. CHESEBROUGH, Claimant,
against
THE UNITED STATES.

Now comes Robert A. Chesebrough, the claimant herein and says:

That on or about the 12th day of June, 1902, this court entered a judgment herein in favor of the United States and against the claimant in which judgment and proceedings prior thereunto in this case certain errors were committed to the prejudice of this claimant; all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this claimant prays that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of the errors so complained of and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

Dated, New York, June 24th, 1902.

COUDERT BROTHERS,
Attorneys for Claimant, No. 71 Broadway, New York City.

Endorsed: Petition for writ of error Filed July 10, 1902 A copy of the within paper has been this day received at this office July 10, 1902 Henry L. Burnett, U. S. attorney.

17 District Court of the United States of America for the Southern District of New York.

ROBERT A. CHESEBROUGH, Claimant in Error,
against
THE UNITED STATES.

Bond for Damages and Costs.

Know all men by these presents, that we, Paul Fuller and Frederic R. Coudert, Jr., are held and firmly bound unto the above-named The United States in the sum of two hundred and fifty dollars, to be paid to the said The United States; for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 24th day of June, in the year of our Lord, one thousand nine hundred and two.

Whereas, the above-named Robert A. Chesebrough has sued out a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of

the district court of the United States for the southern district of New York.

Now therefore, the condition of this obligation is such that if the above-named Robert A. Chesebrough shall prosecute the said writ to effect and answer all damages and costs, if he fails to make his appeal or writ good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

PAUL FULLER. [L. S.]
FREDERIC R. COUDERT, JR. [L. S.]

Sealed and delivered and taken and acknowledged this 24th day of June, 1902, before me—

[SEAL.] CHAS. A. CONLON,
Notary Public, New York County.

18 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

Paul Fuller and Frederic R. Coudert, Jr., being duly sworn do depose and say, each for himself, that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

PAUL FULLER.
FREDERIC R. COUDERT, JR.

Sworn to this 24th day of June, A. D., 1902, before me—

[SEAL.] CHAS. A. CONLON,
Notary Public, New York Co.

Accepted
HENRY L. BURNETT,
U. S. Attorney.

Approved
GEO. B. ADAMS,
U. S. District Judge.

N. Y. Oct. 27th, 1902.

Endorsed: Bond. Filed July 10, 1902 A copy of the within paper has been this day received at this office July 10, 1902 Henry L. Burnett U. S. attorney

19 Supreme Court of the United States.

ROBERT A. CHESEBROUGH, Claimant in Error,
against
THE UNITED STATES.

Afterwards, to wit, on the 24th day of June, 1902, before the Supreme Court of the United States, at the city of Washington, comes the said claimant in error, by Coudert Brothers, his attorneys, and says, that in the record and proceedings aforesaid there is manifest error, in this, to wit, that by the record aforesaid it appears:

First. That the judgment aforesaid, in form aforesaid given, was given for the United States against the said claimant in error.

13889

FILE COPY.

Office Supreme Court U.S.
FILED
DEC 15 1902
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

ROBERT A. CHESEBROUGH,
Plaintiff in Error,
v.
THE UNITED STATES,
Defendant in Error.

Motion to Advance.
No. ~~194~~ 152.

UNITED STATES OF AMERICA, *ss*:

The plaintiff in error respectfully moves the Court to advance the above-entitled cause upon the docket and set it down for hearing as early as possible during the month of October, 1903, or at such other early date as shall be the most convenient to the Court, on the ground that it raises the question as to the constitutionality of the transfer tax on realty imposed by the War Revenue Act of June 13, 1898.

As a further reason for requesting the Honorable Court to advance the above-entitled cause upon the docket, the plaintiff in error alleges that it is the test case upon which the validity of all such impositions will probably be determined; that under the statute but two years is allowed within which to bring suit in the Federal courts after the rejection by the Commissioner of Internal Revenue of claims for refund of such impositions; that the said limitation has now been running against a large number of such rejected

claims for refund ; and that an early hearing and determination of the above-entitled cause will prevent the need of bringing suit upon a large number of such rejected claims.

This cause was brought in the United States District Court for the Southern District of New York for refund of amounts paid as stamp taxes on the transfers of certain real estate. A demurrer by defendant was entered on the following ground : " That this petition does not state sufficient facts to constitutue a claim on the part of the claimant against the United States." On the 12th day of June, 1902, a judgment was entered in the office of the Clerk of the United States District Court for the Southern District of New York sustaining said demurrer interposed by the defendant.

On or about the 24th day of June, 1902, a petition for writ of error to the Supreme Court of the United States was duly presented to the United States District Court for the Southern District of New York, together with an assignment of errors and a bond for damages and costs. Thereafter on the 3d day of July, 1902, a writ of error was allowed by the Hon. George B. Adams, United States District Judge, and on the same day a citation was issued, returnable to the United States Supreme Court at the City of Washington, on the 21st day of July, 1902. The petition for writ of error, assignment of errors, bond, citation and writ of error were duly filed in the office of the Clerk of the United States District Court by a representative of the firm of Coudert Brothers, with instructions to the clerk to have the papers in the matter transferred to Washington. Thereafter, on about the 18th day of October, the plaintiff in error learned for the first time that the record in this case had not been received by the clerk of the United States Supreme Court, and upon investigation at the office of the Clerk of the District Court for the Southern District of New York it was found that through some

13890

error the record in question had never been forwarded. By reason of the said error the above-entitled cause has lost the position on the calendar of this Honorable Court to which it would otherwise have been assigned, and to avoid the delay resulting therefrom, for which plaintiff in error respectfully submits he is in no way responsible, and in view of the importance of the question here raised, he now files the above motion.

The Honorable Attorney-General has expressed his willingness to concur in the above motion.

COUDERT BROTHERS,
Attorneys for Plaintiff in Error.

December 15th, 1902.

F. R. Coudert, Jr.
of counsel.

FILE COPY.

1389

Livingston Middleditch Co., 65 Duane St. Telephone, Franklin 198.

Office Supreme Court U. S.
FILED
OCT 3 1903
JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

ROBERT A. CHESEBROUGH,
Plaintiff in Error,

AGAINST

THE UNITED STATES,
Defendant in Error.

No. 152.
Motion to
Re-assign.

Now comes the plaintiff in error, and respectfully moves this Court to continue the argument in this cause, and re-assign it for hearing upon such day subsequent to November 1st, 1903, as may be most convenient to the Court.

This is an action against the United States under Act of March 3rd, 1887, for the recovery of Six hundred Dollars, the equivalent of which amount in stamps was affixed upon a certain deed of conveyance of real estate situated at Nos. 21 to 24 State Street, in the Borough of Manhattan, City of New York, from the plaintiff in error to the Chesebrough Building Company, executed June 5th, 1900, which stamps were affixed to said deed of conveyance under compulsion of the Act of Congress of June 13th, 1898, entitled "An Act to Provide Ways and Means to meet War Expenditures and for other Purposes." A demurrer to the petition interposed by the United States Attorney for the Southern District

of New York was sustained by the United States District Court for said District, and from the judgment sustaining said demurrer, a writ of error was allowed to this Court.

That upon motion of the attorneys for the plaintiff in error, said cause was assigned to be heard in October, 1903, and upon inquiry at the office of the Clerk it has been ascertained that said cause will come on for hearing within two or three days after the Court convenes.

That Frederic R. Coudert, Jr., of counsel for plaintiff in error is in personal charge of this cause and will present the questions involved herein, namely, as to the constitutionality of the transfer tax on realty imposed by the aforesaid Revenue Act of June 13th, 1898, to this court. Owing to poor health he was obliged to go abroad where he is at present and is not expected to return until about the 24th of October, 1903.

For the reasons above stated the plaintiff in error respectfully moves this court for a continuance and re-assignment of the hearing in this cause.

We understand that the Honorable Attorney-General joins in this motion.

New York, September 18, 1903.

Respectfully submitted,

COUDERT BROTHERS,
Attorneys for Plaintiff in Error.

FREDERIC R. COUDERT, JR.,
PAUL FULLER,
of Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1903.

ROBERT A. CHESEBROUGH,
Plaintiff in Error,

AGAINST

THE UNITED STATES.

No. 152.

This case comes before the court by a writ of error to the United States District Court for the Southern District of New York.

The action was brought to recover the sum of Six hundred dollars, which, under the Act of Congress of June 13th, 1898, the complainant was compelled to pay as a tax upon the conveyance of a parcel of real estate owned by him and as a condition without which such conveyance was prohibited, made punishable as a misdemeanor, and the instrument of conveyance declared invalid and of no effect, and not competent evidence in any court.

Upon a demurrer by the attorney for the United States, judgment was rendered sustaining the demurrer and dismissing the petition (Rec., pp. 3 to 7). The ground of the action is the unconstitutionality of the statute imposing the tax.

For the convenience of the court the relevant portions of the Act of June 13th, 1898, and of the Constitution are here printed:

THE STATUTE.

"On and after the first day of July, 1898, there "shall be levied, collected and paid, for and in re-

"spect of the several bonds, debentures or cer-
"tificates of stock, and of indebtedness, and other
"documents, instruments, matters and things men-
"tioned and described in Schedule A of this act,
"or for or in respect of the vellum, parchment, or
"paper upon which such instruments, matters or
"things, or any of them, shall be written or printed
"by any person or persons, or party who shall
"make, sign or issue the same, or for whose use or
"benefit the same shall be made, signed or issued,
"the several taxes or sums of money set down in
"figures against the same, respectively, or other-
"wise specified or set forth in the said schedule."
(Act of June 13th, 1898, §6.)

Schedule A:

"Conveyance: Deed, instrument, or writing
"whereby any lands, tenements, or other realty sold
"shall be granted, assigned, transferred, or other-
"wise conveyed to, or vested in, the purchaser or
"purchasers or any other person or persons, by his,
"her or their direction, when the consideration
"or value exceeds one hundred dollars and does
"not exceed five hundred dollars, fifty cents; and
"for each additional five hundred dollars or frac-
"tional part thereof in excess of five hundred dol-
"lars, fifty cents." (Act of June 13th, 1898,
Schedule A.)

"That if any person or persons shall make, sign
"or issue, or cause to be made, signed or issued,
"any instrument, document, or paper of any kind
"or description whatsoever, without the same be-
"ing duly stamped for denoting the tax hereby im-
"posed thereon, or without having thereupon an
"adhesive stamp to denote said tax, such person or
"persons shall be deemed guilty of a misdemeanor,
"and upon conviction thereof shall pay a fine of not
"more than one hundred dollars, at the discretion
"of the court, and such instrument, document or

" paper aforesaid shall not be competent evidence " in any court." (Act of June 13th, 1898, §7.)

" That any person or persons who shall register, " issue, sell or transfer or who shall cause to be is- " sued, registered, sold or transferred any instru- " ment, document or paper of any kind or descrip- " tion whatsoever mentioned in Schedule A of this " Act, without the same being duly stamped or hav- " ing thereupon an adhesive stamp for denoting the " tax chargeable thereon and cancelled in the man- " ner required by law, with intent to evade the " provisions of this Act shall be deemed guilty of " misdemeanor and upon conviction thereof shall " be punished by a fine not exceeding fifty dollars " or by imprisonment not exceeding six months, or " both, in the discretion of the court, and such in- " strument, document or paper not being stamped " according to law shall be deemed invalid and of " no effect." (Act of June 13th, 1898, §13.)

THE CONSTITUTION.

" Representatives and direct taxes shall be ap- " portioned among the several States which may be " included within this Union, according to their " respective numbers. * * * The actual " enumeration shall be made within three years " after the first meeting of the Congress of the " United States and within every subsequent term " of ten years." (Const., Art. 1, §1, subd. 3.)

" No capitation, or other direct tax shall be laid, " unless in proportion to the census or enumeration " herein before directed to be taken." (Const., Art. 1, §9, subd. 4.)

" Representatives shall be apportioned among the " several States according to their respective num- " bers." (XIVth Amendment, §2.)

If the tax here in question be a direct tax the statute attempting to impose it is admittedly unconstitutional.

Contents of the Brief.

This Brief is divided into the following heads:

1. Fundamental propositions upon which the argument of plaintiff in error is based.

2. The argument that the tax is a direct tax considered on principle and as an original question.

3. Examination of the genesis and historical development of stamp taxes on conveyances of real estate in England and the United States.

4. Answers to objections and a consideration of the cases cited by the defendant in error as adverse to plaintiff's contention.

POINT I.

Fundamental propositions upon which the argument of plaintiff in error is based.

We contend:

A. The question is whether this is a direct tax; if so, it is necessarily void because not apportioned.

The category of direct taxes, within the meaning of that phrase as used in the Constitution, is determined partly by an examination of the question as an original one in the light of general, logical and economic considerations and partly in the light of the history of taxation in England and America. It is settled law that the Court will look at the real substance and effect of the tax and not be governed or influenced by the particular form or guise in which the tax is laid.

B. Property is a combination or bundle of separate rights or powers conferred by the law upon persons. The three essential rights composing the legal concept "property" are

(1) possession and the right thereto;
(2) income or yield, and
(3) alienability *inter vivos.*

The destruction or inhibition of any of these rights would be a direct destruction or deprivation of property.

C. The tax is direct because it falls directly upon one of the fundaments of property, that is to say, alienability, in precisely the same manner as a tax on land or general property falls upon the right of possession and an income tax on the right of enjoyment. Each of these latter taxes is a direct tax upon the property because upon one of the essential legal attributes which constitute property.

Take away possession or the right thereto and the basis of property fails; confiscate income and the present concept of property as consecrated by our Constitution and legal institutions is erased from our law; prohibit the power of sale and property becomes a mere emasculated right of possession known only to primitive times and to the ancient feudal system based on the ultimate ownership of all land by the crown.

D. There is nothing either in the history of the stamp tax on conveyances in England or in the United States which militates against the view that the tax here involved is a direct tax, but on the contrary this history would tend to show that the tax is really only in form a stamp tax, but a direct property tax in fact. This is also the view of the standard writers on political economy.

The decisions of this Court do not contravene appellant's view, but on the contrary the reasoning in recent cases, notably, *The Income Tax cases*, 157, 158 U.

S., *Nicol* v. *Ames*, 173 U. S., and the *Fairbank* case, 181 U. S., necessarily involve principles, the logical inference from which demonstrate this tax to be direct.

POINT II.

The argument that the tax is a direct tax considered on principle and as an original question.

Austin in his great work on Jurisprudence defines ownership as follows:

> " Section 515. The right to use or deal with " some given subject in a manner or to an extent " which though not unlimited is indefinite. * *
>
> " 518. It is a right residing in a person over or " to a person or thing and availing against other " persons universally or generally. * *
>
> " 1103. It is a right imparting to the owner a " power of indefinite user, capable of being trans- " mitted to universal successors by way of descent, " and imparting to the owner the power of dis- " position from himself. * * (Strictly speaking " and to make the definition apply to every sys- " tem of law), *disposition here must be confined to " an alienation to take effect in the lifetime of the " party entitled. The powers of alienation in ex- " tremis, are* in most systems of law, subject to pecu- " liar restraint."

The more recent and equally learned and scientific writer, Holland, in his Jurisprudence, page 194, says:

> " It is a great advance in civilization when law " throws around the mere fact of possession that " protection which the possessor could previ

13896

" ously have won for it only by his own right " hand. It is a still further advance when law " gives to a man that far ampler measure of right " over an object, quite irrespectively of his having " any actual or even constructive control over it, " which is known as 'Ownership.' The higher is " no doubt a development of the lower right. * * " The right of ownership is, however, unlimited " only in comparison with other rights over ob- " jects. In accordance with the maxim '*sic utere* " *tuo ut alienum non laedas.*' It must always be en- " joyed in such a way as not to interfere with the " rights of others and is therefore defined in the " French Code as: 'Le droit de jouir et dis- " 'poser des choses de la manière la plus absolu " 'pourvu qu'on n'en fasse pas en usage prohibé par " *les lois ou par les règlements.* (Art. 544.) * * Va- " rious attempts have been made to enumerate the " attributes or powers of an owner. He is said to " have rights '*utendi*,' '*fruendi*,' '*abutendi*,' '*fructus* " *percipiendi*,' '*possidendi*,' '*alienandi*.' *and* '*vendi-* " *candi*.' But what has to be said with reference to " the orbit or contents of the right of ownership " may be conveniently arranged under the three " heads *of possession, enjoyment and disposition.* " * * The right of disposition carries with it the " right of alteration or destruction and also *the* " *right of alienation.* (p. 196.) * * * *" Mirabeau defines property as " *un avantage conféré par les* " *conventions sociales.* (p. 152.) Recent investiga- " tors, and especially Sir Henry Maine have abun- " dantly shown that there is in early times but " little trace of individual ownership. * * * The " idea that property really belongs to a family " group and that the right of an individual is " merely to administer his share of it during his " lifetime may be said still to survive in those pro- " visions against the total disinheriting of rela- " tions which modern systems have borrowed

"from the Roman law and less obviously in the "rights given to next of kin under statutes of "distribution. * * The principle that a man "may voluntarily select the person on whom his "property is to devolve after his death is of later "origin than the principle of intestate succession. "Such a selection had at first to be ratified by "legislative authority in order to oust the rights "of the relatives." (p. 153.)

From the above quotations it is evident that the power of disposition *inter vivos* is an essential attribute of property. It is equally fundamental with possession and enjoyment and the three together form the legal concept of property which is protected by the Constitution and which even the paramount power of Congress cannot attain. It is idle to argue that in the remote past or under the Norman feudal system once prevalent in England property was not alienable or allodial; all legal concepts and institutions are the product of evolution and development; in using the word "property" our Constitution and our laws do not mean the hut which the primitive Ayran was able to occupy so long, and only so long, as his good right hand could vanquish all comers who attempted to disturb his precarious possession, but "property," as that term is now understood and consecrated in the United States Constitution, has a fixed and definite meaning, the result of centuries of legal and social development.

We insist somewhat upon these seemingly elementary principles for the reason that we believe a tax on the power of disposition *inter vivos* (that is to say sale or conveyance) is direct, precisely as is a tax upon property generally or upon the income thereof, within the meaning of the Constitution, a direct tax. (*Income tax cases.*) Alienability cannot be considered a less essential part of property than income or possession. It is in fact a fundamental right. As the learned Mr. Justice Brown

has so aptly said (*United States* v. *Perkins*, 163 U. S., 625):

> " While the laws of all civilized States recognize " in every citizen the absolute right to his own " earnings and to the enjoyment of his own prop- " erty, and the increase thereof, *during his life*, " except so far as the State may require him to " contribute his share for public expenses, the " right to dispose of his property by will has " always been considered purely a creature of " statute and within legislative control." (p. 627.)

Numerous decisions of this Court, notably *Magoun* v. *Illinois Trust Company*, 170 U. S., 283, *United States* v. *Perkins*, 163 U. S., 625, and the recent case of *Knowlton* v. *Moore*, 178 U. S., 41, and the cases there cited, abundantly show that the right to dispose of property by testament or the right to take by intestate succession are not fundamental rights of property protected by the Constitution of the United States.

It is this distinction between the right of alienation *inter vivos* and the rights just mentioned which make inapplicable to the present case the case of *Knowlton* v. *Moore* and others which had to deal with a purely municipal right, that is to say heritability and testacy.

The criterion as to whether this tax is in principle one directly imposed upon the property transferred is easily seen by the following considerations: If Congress should enact generally that all real estate should be inalienable absolutely or only under legislative or administrative permission, it is perfectly clear that the inhibition of the Constitution against the taking of property without due process of law or without the payment of proper compensation would be absolutely violated, and this would be equally true of legislation by the States.

A very good illustration is found in the case of *Wynehamer* v. *The People*, in 13 N. Y., 378. An act

of the Legislature of New York made in pursuance of a desire to restrain the use of intoxicating beverages made it unlawful to sell certain alcoholic liquors. This was held to prevent a disposition of property by the owner and thus to virtually destroy that property, and hence to contravene Article 1, Section 6 of the State Constitution,

> "That no person shall be deprived of life, lib-
> "erty or property without due process of law;
> "nor shall private property be taken for public
> "use without just compensation."

Judge Comstock there remarked in referring to the sale of liquors (p. 384):

> "In this country the right of property in them
> "(liquors) was never so far as I know for an instant
> "questioned. In this State they were bought and
> "sold like other property. * * In short, I do
> "not understand it to be denied that they were
> "property in just as high a sense as any other
> "possession which a citizen can acquire."

After stating the objections against the use of alcohol on social grounds, he continues:

> "But if such arguments can be allowed to sub-
> "vert the fundamental idea of property, then
> "there is no private right entirely safe, because
> "there is no limitation upon the absolute discre
> "tion of the legislature, and the guarantees of
> "the Constitution are a mere waste of words.
> "The foundation of property is not in philosophic
> "or scientific speculations, nor even in the sug-
> "gestions of benevolence or philanthropy. It is
> "a simple and intelligible proposition, admitting,
> "in the nature of the case, of no qualification,
> "that that is property *which the law of the land*
> "*recognizes as such. It is, in short, an institution*
> "*of law, and not a result of speculations in science,*

" *in morals or economy.* (pp. 384-5.) * * As property " the right to sell them (liquors) is denied and *their* " *commercial value is thus annihilated.* (p. 389.) " * * When a law annihilates the value of proper- " ty *and strips it of its attributes, by which alone it is* " *distinguished as property*, the owner is deprived " of it according to the plainest interpretation, " and certainly within the spirit of a constitution- " al provision intended expressly to shield private " rights from the exercise of arbitrary power." " (p. 398.)

Upon principle then, it is entirely clear that a tax upon alienability is a direct tax upon property as Mr. Justice Peckham well remarked in *Nicol* v. *Ames*, 173 U. S., 509, at p. 518.

" It is asserted to be a direct tax, because it is " a tax upon the sale of property measured by the " value of the thing sold, and such a tax is a di- " rect tax upon the property itself, and therefore " subject to the rule of apportionment. Various " cases are cited, from *Brown* v. *Maryland*, 12 " Wheat., 419, down to those involving the valid- " ity of the income tax, 157 U. S., 429; 158 U. S., " 601, for the purpose of proving the correctness " of this proposition. All the cases involved the " question whether the taxes to which objection " was taken amounted practically to a tax on " the property. If this tax is not *on the property* " *or on the sale thereof*, then these cases do not " apply." (pp. 518-19.)

The Court then holds that the tax was not upon the sale itself but upon the privilege of dealing at an exchange :

" A sale at an exchange does form a proper " basis for a classification which excludes all sales " made elsewhere from taxation." * *

> " A tax upon the privilege of selling property at " the exchange * * differs radically from a tax up- " on every sale made in any place. *The latter tax is* " *really and practically upon property. It takes no* " *notice of any kind of privilege or facility, and* " *the fact of a sale is alone regarded.*" (p. 521.)

While the question here involved has never been directly decided in this Court the foregoing extract from the opinion of *Nicol* v. *Ames* would clearly indicate the opinion of the Court to be that a tax upon all sales generally was a direct tax upon the property. Direct taxes have been defined by this Court as follows:

> " Direct taxes in a general and large sense may " be described as taxes derived immediately from " the person or from real or personal property " without any recourse therefrom to other sources " for reimbursement." *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S., 429, at p. 588.

It cannot, of course, be seriously contended that this tax is in its nature a stamp tax. We will see in examining the historical development of stamp taxation that there is such a thing as a true stamp tax, that is to say, a tax imposed under the guise of a stamp upon certain legal instruments and which tax is levied upon the instruments as such and apart from the property or transaction to which they have reference.

The Court will look at the substance of a tax and not at the form as was clearly held in the decision in the recent case of *Fairbank* v. *The United States*, 181 U. S., 283. Even the dissenting opinion in that case shows that the tax here involved which is proportioned to the amount of the transaction is not a real stamp tax. Mr. Justice Harlan there says (p. 317):

> " If Congress had graduated the stamp duty " *according to the quantity or value* of the articles " exported, there might have been ground for

13899

"holding that the purpose and the necessary
"result was to tax the property and not the
"vellum, parchment or paper on which the bill of
"lading was written or printed."

And again he says:

"A stamp duty has now, and has had for
"centuries, a well-defined meaning. It has always
"been distinguished from an ordinary tax *meas-*
"*ured by the value* or kind of the property taxed.
"If Congress, in respect of a bill of lading for
"articles to be exported, had imposed a tax of
"five thousand dollars for and in respect of the
"vellum, parchment or paper upon which such
"bill was written, the Courts, looking beyond
"form and considering substance, might well have
"held that such an act was contrary to the
"settled theory of stamp tax laws, and that the
"purpose and necessary operation of such legisla-
"tion was, in violation of the Constitution, to tax
"the articles specified in such bill and not to im-
"pose simply a stamp duty." (p. 318.)

The illustration given by the learned Justice is especially apposite in this case as the stamps on realty conveyances often amounted to hundreds of dollars and sometimes went into the thousands, thus making it an absurdity to consider the tax as one upon the parchment or vellum upon which the conveyance was printed.

How far this Court in determining the question as to whether a tax is direct or not will be governed by the opinions of economists as to the shifting of the incidence of the tax from the seller to the buyer was much discussed in the famous Income Tax Cases. It is an economic question much debated and upon which economists have held various and shifting theories. The Court has held repeatedly that it will not be guided by

the views of economists upon this point and will only advert to the question of incidence as a make-weight in reaching the conclusion as to whether a tax is direct or indirect. The incidence is however, an argument which the Court will look at among others in reaching a conclusion.

This tax is a direct tax in the economic sense.

The framers of the Constitution were familiar with the "Wealth of Nations," the great standard work on economics. Their views as to what taxes were direct *i. e.*, incapable of being shifted must have been largely influenced by the opinion of Adam Smith. He says:

> "Taxes upon the transference of property from "the dead to the living, fall finally as well as im- "mediately upon the person to whom the prop- "erty is transferred. Taxes upon the sale of land "fall altogether upon the seller. The seller is "almost always under the necessity of selling, and "must, therefore, take such a price as he can get. "The buyer is scarce ever under the necessity of "buying, and will, therefore, only give such a price "as he likes. He considers what the land will "cost him in tax and price altogether. The more "he is obliged to pay in the way of tax, the less "he will be disposed to give in the way of price. "Such taxes, therefore, fall almost always upon a "necessitous person, and must therefore, be fre- "quently very cruel and oppressive. * * *
>
> "Such stamp duties as those in England upon "cards and dice, upon newspapers and periodical "pamphlets, etc., are properly taxes upon con- "sumption; the final payment falls upon the per- "sons who use or consume such commodities. "Such stamp duties as those upon licenses to re- "tail ale, wine, and spirituous liquors, though in- "tended, perhaps, to fall upon the profits of the re- "tailers, are likewise finally paid by the consumers "of those liquors. Such taxes, though called by

13900

" the same name, and levied by the same officers
" and in the same manner with the stamp duties
" above mentioned upon the transference of prop-
" erty, are however of a quite different nature, and
" fall upon quite different funds."

Smith on the Causes of the Wealth of Nations, Article 1, pp. 685, 686, 687.

The eminent John Stuart Mill, whose work is the "classic" on political economy agrees with the "father of political economy" that the realty conveyance tax is direct in its nature.

" Of taxes on contracts, the most important are
" those on the transfer of property; chiefly on pur-
" chases and sales. Taxes on the sale of consum-
" able commodities are simply taxes on those com-
" modities. If they affect only some particular
" commodities, *they raise the prices of those com-*
" *modities, and are paid by the consumer. If the*
" *attempt were made to attack all purchases and*
" *sales, which, however absurd, was for centuries*
" *the law of Spain, the tax, if it could be enforced,*
" *would be equivalent to a tax on all commodities*
" *and would not affect prices;* if levied from the
" sellers, it would be a tax on profits, if from the
" buyers a tax on consumption; and neither class
" could throw the burden upon the other. If con-
" fined to some one mode of sale, as for example
" by auction, it discourages recourse to that mode,
" and if of any material amount, prevents it from
" being adopted at all, unless in a case of emerg-
" gency; in which case as the seller is under a
" necessity to sell, but the buyer under no neces-
" sity to buy, the tax falls on the seller; and this
" was the strongest of the objections to the auc-
" tion duty; it almost always fell on a necessitous
" person, and in the crisis of his necessities.

" Taxes on the purchase and sale of land are,

" in most countries, liable to the same objec-
" tion. Landed property in old countries is sel-
" dom parted with, except from reduced circum-
" stances or some urgent need; the seller therefore,
" must take what he can get, while the buyer,
" whose object is an investment, makes his calcu-
" lations on the interest which he can obtain for
" his money in other ways, and will not buy if he
" is charged with a government tax on the trans-
" action. It has indeed been objected, that this
" argument would not apply if all modes of per-
" manent investment, such as the purchase of gov-
" ernment securities, shares in joint-stock com-
" panies, mortgages and the like, were subject to
" the same tax. But even then, if paid by the
" buyer, it would be equivalent to a tax on inter-
" est; if sufficiently heavy to be of any impor-
" tance, it would disturb the established relation
" between interest and profit; and the disturbance
" would redress itself by a rise in the rate of inter-
" est, and a fall of the price of land and of all se-
" curities. *It appears to me, therefore, that the*
" *seller is the person by whom such taxes, unless*
" *under peculiar circumstances will generally be*
" *borne.*

" All taxes must be condemned which throw ob-
" stacles in the way of the sale of land, or other
" instruments of production. Such sales tend nat-
" urally to render the property more productive.
" The seller, whether moved by necessity or
" choice, is probably some one who is either without
" the means, or without the capacity, to make the
" most advantageous use of the property for pro-
" ductive purposes; while the buyer on the other
" hand, is at any rate not needy, and is frequently
" both inclined and able to improve the property,
" since, as it is worth more to such a person
" than to any other, he is likely to offer the high-
" est price for it. All taxes, therefore, and all

" difficulties and expenses, annexed to such con-
" tracts, are decidedly detrimental; especially in
" the case of land, the source of subsistence, and
" the original foundation of all wealth, on the im-
" provement of which, therefore, so much depends."

Concluding therefore upon this point, we respectfully submit that upon principle and in its very nature the tax is direct because imposed upon the power of alienation which is one of the three essential legal rights constituting property; consequently it must fall within the same category as a tax on the possession of property, or upon its income (enjoyment). The three taxes are necessarily in the same category, *i. e.*, direct taxes. This result is inevitable if the question is to be viewed from the standpoint of logic, of economics or of judicial precedent. We can appeal to no other standards.

POINT III.

Examination of the genesis and historical development of stamp taxes on conveyances of real estate in England and the United States.

In the standard work upon the history of taxation in England (Dowell), it is stated that stamp taxes originated in England in 1694, having been borrowed from Holland where they were imposed upon all legal documents. Dowell, Vol. II, p. 62.

> These stamp taxes were on royal grants of presentations to benefices and various instruments of that class, and also for a multiplicity of other legal instruments.
>
> " The tax contained the germs of the important
> " taxes on deeds of conveyance, settlement, mort-

"gage and lease, probates of wills." Dowell, Vol. II, p. 62. Stamps became *not only a method of taxing legal instruments but a method of collecting taxes of various kinds, usually excises.*

"The meaning of stamp duties in this chapter "is limited to duties on documents and writings "having a legal operation or forming necessary "steps in suits in the law Courts, briefly, instru- "ments and law proceedings. Many taxes of "various descriptions have at different times, "some when first imposed, others subsequently, "by transfer from another branch of the revenue, "been placed, for purposes of administration, "under the management of the Commissioners of "stamps, and during their continuance in that "position have been termed 'stamp duties' or "'duties of stamps.' The taxes on horses, race- "horses, stage coaches, post horses, passengers by "railway, property insured from risk of fire, on "hawkers and peddlers, pawnbrokers, appraisers, "bankers, attorneys and solicitors, proctors and "conveyancers, publicans and tavern keepers; on "hats, gloves and mittens, hair powder and poma- "tum, cosmetics, proprietary medicines, choco- "late, cards and dice; on legacies and successions "of personal property on a death, and others "have been or are *stamp duties in this sense.* In "this work *these taxes* will be found under the "heads of taxes *on persons, on property* or some- "thing analogous to property, or on articles of "consumption notwithstanding the fact that they "may have been at some time unstamped 'duties "of stamps,' as taxes misplaced in the stamp "branch were termed in revenue language, or "'stamp duties upon matters or things' as they "are termed in several Acts of Parliament in "contradistinction to stamp duties upon instru- "ments." Dowell, Vol. III, 321.

The tax on a conveyance or deed was originally a fixed amount upon the number of folios used.

> "The duties were charged for every skin or piece " of parchment or paper upon which any instru- " ment was written, and in order to prevent any " curtailment of length with a view to avoid pay- " ment of the duties, deeds and writings were re- " quired to be engrossed and written in the man- " ner theretofore customary. *The tax was, there- " fore, to a certain extent a tax on the amount of " paper used.*" Dowell, Vol. III, 324.

In 1714 for the first time appears the principle of percentage tax on the amount of the transaction.

> "By this Act (1714) the duties on grants of money " and offices were increased by reference to the " amount granted and the value of the office. " This is interesting as the commencement of *ad " valorem* charges, that is to say, charges having " reference to the magnitude of the transaction as " opposed to the length of the instrument." (p. 326.) The deed duty was not, however, changed from an ordinary stamp tax to percentage tax. Although Pitt attempted to do so he failed.
>
> "In 1795 the duty upon deeds was raised to 10s. " an amount which was payable in respect of " every skin on which the deed was engrossed, the " number of words or folios to be written on a " single skin of parchment was still limited by " law and therefore *in principle the tax continued " to be a tax on deeds by reference to the length and " such had been up to this date the governing prin- " ciple of the stamp tax.*" *Id.* pp. 329–330.

The English Stamp Act of 1870 consolidating the various stamp duties imposes a percentage duty on conveyances on sale which is defined as "any instrument whereby any property upon the sale thereof is

legally or equitably transferred to or vested in the purchaser."

It thus appears that the development of the percentage or progressive stamp tax is a late one in English law and not until quite recently has it been applied to deeds or conveyances of sale. The question whether such a tax was not a direct tax did not and could not arise as a legal question in England as the English Parliament is, of course, bound by no limitations in this respect as is the Congress of the United States. The history of British taxation does not show the adoption of any definite rule or scientific classification of direct and indirect taxes. Dowell, for instance classifies taxes as follows:

> First. Taxes on persons, capitation or occupation.
>
> Second. Property, land, income, movable, death duties, property sold by auction and property insured.
>
> Third. Taxes analogous to a property tax, for instance, hearth-money, window tax, inhabited houses, taxes on domestic establishments, persons having horses, dogs, servants, guns, etc.
>
> Fourth. Stamp duties on legal instruments and contracts. Table of Contents, Vol. III.

In the United States this tax on real estate conveyances has never been imposed but once before. While the laws of 1797 (Chap. 11, Act. July 6th) as well as the laws of 1813 (Chap. 53, August 2nd) provided various progressive stamp taxes, taxes on bonds, promissory notes, etc., conveyances or sales are not included. It was reserved for the omnibus and omnivorous civil war tax law of 1862, 12 Stat. at L., 479, to lay a tax on

> " any deed, instrument or writing whereby any
> " lands, tenements or other realty sold shall be

" granted, assigned, transferred or otherwise con-
" veyed to or vested in the purchaser or purchas-
" ers, or any other person or persons by his, her
" or their direction."

It is thus evident that there is nothing either in English history or the practice of the government save the statute just mentioned which could serve as a precedent for contending, as has been contended in other tax cases in this Court, that long continued congressional or administrative usage should be considered as an element in determining the constitutionality of the tax.

In the *Fairbank* case, although the Acts of 1797 and 1813, as well as that of 1862, had provided for a tax on foreign bills of lading, the Court nevertheless held that such action on the part of Congress in no way precluded it from examining into the real nature of the tax itself and used the following language, which is even more pertinent to this tax, the sole legislative precedent for which is to be found in the tax of 1862.

" It will be perceived that these stamp duties
" have been in force during only three periods:
" First, from 1797 to 1802; second, from 1862 to
" 1872; and third, commencing with the recent
" Statute of 1898. It must be borne in mind also
" in respect to this matter that during the first
" period exports were limited, and the amount of
" the stamp duty was small, *and that during the*
" *second period we were passing through the*
" *stress of a great civil war or endeavoring to*
" *carry its enormous debt; so that it is not*
" *strange that the legislative action in this respect*
" *passed unchallenged.* Indeed it is only of late
" years, when the burdens of taxation are increas-
" ing by reason of the great expense of govern-
" ment, that the objects and modes of taxation
" have become a matter of special scrutiny. But
" the delay in presenting these questions is no ex-

"cuse for not giving them full consideration and "determining them in accordance with the true "meaning of the Constitution."

Fairbank v. U. S., 181 U. S., page 311–12.

The above case held that a tax of 25 cents on bills of lading of goods intended for export, is a tax on the export itself, and therefore obnoxious to the constitutional restriction as to the taxation of exports. The reasoning of this case to the effect that form and not substance will be looked into is very apposite here.

Mr. Justice Brewer cites among other cases, that of *Brown* v. *Maryland*, 12 Wheat., 419, in which a licensed tax upon the importers of foreign articles was held to be in fact, though not in form, a tax on imports and therefore one which a State could not constitutionally levy. He quotes with approval the language of Chief Justice Marshall as follows:

"All must perceive, that a tax on the sale of an "article, imported only for sale, is a tax on the "article itself. It is true the State may tax occu- "pation generally, but this tax must be paid by "those who employ the individual, or is a tax on "his business. * * This the State has a right to "do, because no constitutional prohibition extends "to it. So a tax on the occupation of an im- "porter is, in like manner, a tax on importation. "* * * This the state has not a right to do, be- "cause it is prohibited by the Constitution."

It is a misapprehension to assume as did the learned District Judge in the case of *Thomas* v. *The United States*, that *Brown* v. *Maryland*, the *Fairbank* case, and those of a similar class are cited by us as authority for the proposition that because a tax on an importer or an export bill of lading was held to be a tax upon an import, that by parity of reasoning a tax on a deed of conveyance, is therefore necessarily a

direct tax. It is not contended that any tax falling within the export prohibition clause of the Constitution is necessarily a direct tax. These cases are not cited, with any such purpose, but to show that the Court will look into the real nature of the tax whatever its form.

In this case a similar examination of the tax shows it to be a tax upon the power to sell, which is an integral property right, and by taxing which, property is directly burdened within the meaning of the words "direct taxes."

POINT IV.

Answers to objections and a consideration of the cases cited by the defendant in error as adverse to contention of plaintiff in error.

The objections which will probably be urged by the learned Attorneys for the Government in opposition to our position have been succinctly set forth by Circuit Judge Thomas in the case of *United States* v. *Thomas*, Fed. Rep., recently decided. upon the question as to the constitutionality of the tax on transfer of stock certificates. While some of the questions in that case have no bearing upon the case at bar by reason of the nature of corporate certificates many of the arguments used by the Circuit Judge in upholding the validity of the tax therein involved would apply, if sound, equally well to the tax here in question. His objections considered *seriatim* as stated, by him, are:

1. "The expressions in the cases where no tax was "valid, that a tax on vendors or occupations, or "shipping bills, was a forbidden tax on the com- "modities, would, if applied to instances where "the taxing power has been uniformly recognized, "vitiate the same."

This is based upon a misconception of the position of the plaintiff in error. While a tax upon a foreign importer is a tax upon the thing imported, and therefore invalid, we do not contend that a tax on the occupation of importers is itself a direct tax; it may be considered an excise or occupation tax such as has been imposed in England from early times and has been in force in the United States several times since the adoption of the Constitution. This distinction is pointed out by Mr. Justice Brown in his dissenting opinion in *Pollock* v. *The Farmers' Loan & Trust Company*, 158 U. S., 691. In that opinion he reviews the cases from *Brown* v. *Maryland*, 12 Wheat., 419, down to *Cook* v. *Pennsylvania*, 97 U. S., 566, with a view to indicating that the question there involved was not as to whether a tax was direct or not, but whether it in reality affected the prohibited thing, that is, imports, exports or interstate commerce.

We have cited these cases simply with the purpose of showing that this Court will examine the Constitution in the light of its plain meaning, looking at each question from the standpoint of substance rather than form, and not feeling itself in any way bound by congressional or administrative usage unless the question is in itself so doubtful or ambiguous as to make usage valuable as a make-weight in reaching a conclusion.

We state thus candidly our views as we do not desire to attempt to hold untenable positions but consider that the cases adverted to, while not directly deciding the propositions contended for by appellant, necessarily and logically sustain his reasoning.

2. The second objection formulated by the Circuit Judge is as follows:

> "In whatever form a tax is laid its payment "must be primarily from the taxpayer's prop- "erty. In this sense the same is the subject of "the tax."

13905

This is a truism with which we have no quarrel. Every tax must fall ultimately on property, even a capitation tax, but the tax here in question *is levied directly upon the exercise of a right of property*, precisely as the tax found unconstitutional in the Income Tax cases was imposed upon another equally essential right of property, namely, the collection of the income or earnings of real estate or personalty.

3. Judge Thomas' third objection is that:

> " A statute providing for a direct tax with cer-
> " tainty burdens by lien or generally the tax
> " payer's property, and in theory appropriates *pro*
> " *tanto* his income and encumbers his principal,
> " while a statute providing for a tax on sales in-
> " terrupts no enjoyment of property, makes no
> " exaction from principal or income beyond
> " placing a tax upon a transaction attending the
> " disposition of property."

This objection seems to us to be unsound in its premise because a tax upon the power of sale necessarily encumbers the property. Should the power of sale be prohibited by law, property would certainly be much injured in value and would in fact cease to be property, so in a proportionate degree any encumbrance placed upon alienability must equally and progressively diminish the value of property (*vide* citations *Wynhamer* v. *Peo.*, *supra*). This seems to us too clear from the standpoint of ordinary deduction to require further comment.

4. The Judge's fourth objection is:

> " That the right to tax a pursuit, occupation or
> " business involves the right to tax the same in
> " whatsoever limited degree it is adopted and fol-
> " lowed, so that a right to tax one for carrying
> " on the business of selling shares of stock involves
> " the power to tax the sale of a single share of
> " stock."

This objection seems to us to radically ignore the basis of a business or occupation tax, which is in its nature a tax upon a license or privilege exercised by a certain class of persons. Probably the oldest occupation tax was that upon attorneys at law, and in the history of English and American taxation it has been extended to various other occupations.

> " A tax on the legal profession imposed, by Pitt, " in 1785, the same year as the taxes on shops and " pawnbrokers, formed one of the annual *license* " *taxes* he was at this date endeavoring to intro- " duce into our fiscal system." Dowell, Vol. III, p. 20.

To hold that the owner of property by exercising one of its fundamental attributes thereby becomes a business man exercising a privilege or license and taxable on such, seems to us wholly fallacious. It ignores the pith of plaintiff's contention which is that any tax is direct which is imposed upon one of the necessary incidents of all property ; the mere exercise of any one of which is an ordinary attribute of ownership regardless of whether it be exercised as an incident to a trade or calling or merely for the owner's immediate gratification and support.

5. His fifth objection is :

> " That the right to lay an unapportioned tax on " sales is not limited to sales of commodities " whereby the tax may be shifted in whole or " in part, and the conflicting views of the econo- " mists should influence the legislature and not " constrain the courts."

A tax upon sales of ordinary commodities has never been considered by economists a direct tax upon property, because the consumer was thought to pay the tax. While economists may not be wholly in ac-

cord on this point, taxes on spirits, tobacco, salt, sugar, etc., have always been considered as falling within the category of excises or indirect taxes, and the question was so absolutely and definitely settled by the trend of English tax legislation, prior to the time of the adoption of the Constitution, that there could have been no question in the minds of the framers that the word "direct" taxes did not include such excises.

In the recent case of *Patton* v. *Brady*, the point was suggested that a tax upon a manufacturer of tobacco is in reality a direct tax in the meaning of the Constition, to which Mr. Justice Brewer answered:

> "But as we have seen, it is not a tax upon prop-
> "erty as such but upon certain kinds of property,
> "*having reference to their origin and intended*
> "*use.*"

6. The Judge in the Thomas case appeals to the legislation of 1862 as showing a similar instance of taxation. This objection has already been adverted to in a preceding point.

7. His seventh objection is that

> "taxes on sales or transfers of property are indi-
> "rect within the holdings of the Supreme Court."

He relies to sustain this view largely upon the case of *Knowlton* v. *Moore*, 178 U. S., 41, which held, that a legacy or inheritance tax was levied neither directly upon the property itself, nor upon the power of the State to regulate inheritances, but upon the act of transmission itself, or upon the consequence of death which is the generating source of the tax. This case can have no application to the case at bar, because the act of transmission is a privilege accorded by the State to the heirs or devisees of the dead man. Such a privilege is not a property right as understood within the meaning of the Constitution of the United States.

If the State abolished it, such law would not fall within the condemnation of XIV Amendment. *Magoun* v. *Illinois Trust Company*, 170 U. S., 283, and, consequently, the tax falls not upon one of the three essential attributes of property but upon the right or privilege accorded by the State to legatees or devisees, which right or privilege is a comparatively recent creation of municipal law and not a fundamental property right. While Mr. Justice White suggests that indirect taxes may be regarded as a tax on an act or event this rule could not apply to an act which is a necessary incident to mere ownership. *Knowlton* v. *Moore*, 178 U. S., 41.

The eminent President Hadley of Yale says in regard to direct and indirect taxes:

"There is no doubt that there is a real distinction between these two kinds of taxes; but there is a great deal of doubt whether the distinction just drawn (which is that of Smith and Mill) correctly marks the line between them. * * *

"In view of this difficulty, Continental writers have generally preferred to define direct taxes as those which are assessed on persons (or property) and indirect taxes as those which are levied on acts. This is correct enough in its practical applications. But *it fails to indicate any real distinction of principle and therefore in a considerable number of cases which can be regarded in either light* (*e. g. taxes on occupations*) *we cannot use the definition as a criterion.* We decide on unformulated grounds to which class a tax belongs and interpret our definition accordingly." (Economics, page 461).

8. The last objection is that the tax is difficult if not impossible of apportionment. This argument, however, would have applied quite as well to the income tax and was urged with great vehemence in that case but did not find favor with the learned Court.

Concluding, therefore, we contend that in its nature the tax is directly and really upon property; that there is nothing in the historical genesis or development of the tax to show that it has ever been considered otherwise; and that further the *Income Tax Cases*, *Nicol* v. *Ames*, and *Fairbank* v. *U. S.* cannot be reconciled with any other theory.

All of which is respectfully submitted to the Honorable Court.

November, 30, 1903.

FREDERIC R. COUDERT, JR.,
PAUL FULLER,
Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 153

ROBERT A. CHESEBROUGH, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES, DEFENDANT IN ERROR.

REPLY BRIEF FOR PLAINTIFF IN ERROR ON QUESTION OF PROTEST AND VOLUNTARY PAYMENT.

HENRY M. WARD,
For Plaintiff in Error.

PAUL FULLER,
F. R. COUDERT, JR.,
Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1907

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 491.

ROBERT A. CHESEBROUGH, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES, DEFENDANT IN ERROR.

Reply Brief for Plaintiffs in Error on Question of Protest and Voluntary Payment.

In reply to the first point in the original brief and to the additional brief of the Attorney General on the questions of protest and voluntary payment, we respectfully submit the following points:

I. As the case was decided below on demurrer to the petition, all facts and inferences of fact relevant to the allegations of the petition will be deemed established in favor of claimant.

II. The facts set out in the petition show an involuntary payment of the tax sought to be recovered.

III. By statute and under the regulations of the Treasury Department protest is not required to be made *at the time of paying the tax.* In lieu of protest an application must be made to the Commissioner for a refund at any time within

two years from the date of payment. This is the statutory equivalent of a common-law protest or notice of suit. The claimant has fully complied with the statute and regulations.

FIRST. *As the case was decided below on demurrer to the petition, all facts and inferences of fact relevant to the allegations of the petition will be deemed established in favor of claimant.*

This is an elementary rule of pleading applicable as well to suits against the Government under the Tucker act as to actions in the ordinary courts of law.

It is set out in the petition (R., 4, 5) that the act provided a heavy fine for failure to affix the stamps, and that unstamped documents should not be received in evidence, and that claimant "under compulsion of said law," *i. e.*, to avoid the risk of fine and of a trial in the criminal courts for a misdemeanor and "in order to entitle such deed to be recorded * * * and to be received as evidence in the Federal courts * * * and in order * * * to fulfil his contract * * * to make * * * a good and sufficient deed * * * and in order to give a good and clear title to said real estate free from doubt did purchase from Charles H. Treat the U. S. collector of internal revenue * * * and place on said deed stamps to the amount of $600."

Under these very general allegations, all admitted by the demurrer, almost any facts showing an involuntary payment would be admissible in evidence, and claimant is entitled to the inference of fact that the payment was involuntary.

In view of these allegations in the petition, the absence of protest is *matter of defense to be raised by answer and not available on demurrer.*

SECOND. The facts set out in the petition show an involuntary payment of the tax sought to be recovered.

The general rule of law is that money voluntarily paid under a mistake of law cannot be recovered, but that an involuntary payment can be recovered where the party to whom it was made had not the right to receive it.

A "protest" is merely satisfactory evidence that the payment was involuntary, but where the parties are not on equal terms, where one compels the payment by threats or duress, the law presumes that the payment was not made at free will. This point is fully discussed in the case of *Swift Company vs. U. S.*, 111 U. S., 22, at pages 28–30.

THIRD. By statute and under the regulations of the Treasury Department protest is not required to be made at the time of paying the tax. In lieu of protest an application must be made to the Commissioner of Internal Revenue for a refund at any time within two years from the date of payment. This is the statutory equivalent of a common-law protest or notice of suit. The claimant has fully complied with the statute and regulations.

The learned Attorney General cites, at page 13 of his brief, section 31 of the act of July 1, 1862, which did, indeed, require a protest; but this act has been long since repealed, and in its place we have a complete statutory procedure for obtaining the refund of all internal-revenue taxes which "appear to be unjustly assessed * * * or in any manner wrongfully collected" (R. S., § 3220).

At page 14 of his brief the Attorney General argues that as the law was settled under the act of 1862, and under the decision of this court in *Philadelphia vs. Collector*, 5 Wall., 720, that a protest was necessary, the law is now the same, because the Revised Statutes do not provide that a protest is *not necessary*. We submit that the conclusion to be drawn is just the opposite. Section 3220 is taken almost *verbatim* from the act of July 13, 1866, 14 Stat., 98, 111, which is *in pari materia* with the act of 1862. As in the act of later date the requirement of protest is omitted, the intention of

Congress evidently was that it should be no longer required.

The provisions of the Revised Statutes for the refunding of internal-revenue taxes are remedial, and therefore entitled to a most liberal construction in favor of the tax-payer, particularly as the courts are deprived by section 3224 of all power to restrain their collection.

The late distinguished Judge Richardson, of the Court of Claims, said with reference to these provisions in *Savings Bank of Pittsburgh vs. U. S.*, 16 Ct. Cl., 335, at 348:

"We said in *Kaufman's case*, 11 C. Cl. R., 669, that 'It has ever been the general and liberal policy of the Government under such regulations as Congress has either itself seen fit to make or has required its officers to provide to remit and refund taxes and duties erroneously assessed or paid in excess of legal obligations in order that the burdens of taxation may not fall unjustly upon any of its citizens.'

"The Treasury Department has followed the same liberal policy in construing and administering the law through the Internal Revenue Bureau.

"It is a principle universally recognized and enforced in the courts of law that an action cannot be maintained for the recovery back of money paid in discharge of a tax illegally assessed unless the payment was made under protest. But that principle has as uniformly been held by the Commissioner of Internal Revenue * * * *as altogether too technical and too exacting* for application to the refund of taxes through the Commissioner and from the beginning *no proof of protest has been required.*"

Kaufman's case was affirmed (96 U. S., 570), and the Savings Bank's case (104 U. S., 728).

The provisions of law for securing the refund of internal-revenue taxes are nearly assimilated to those for customs duties. Under sections 3220 and 3226 application must first be made to the Commissioner before suit can be brought in any court, and this application must be within two years. Under the customs laws a "notice of protest" must be filed within ten days after, *and not before*, not the payment of duties,

but *the liquidation of the entry*. This so-called "notice of protest" is really an appeal from the collector to the board of appraisers, but in neither case is it required that there should be any protest or notice *at the time of payment of the duties*.

Whether this application is made five minutes or ten days or two years *after* the payment, it is not the protest required by common-law principles in order to maintain an action against the *collector*.

Elliott vs. Swartwout, 10 Pet., 137, 152.
Erskine vs. Van Arsdale, 15 Wall., 75, 77.

It would be an extraordinary judicial construction of sections 3220, 3226, 3227, and 3228 to hold that while the application to refund could be made to and granted by the Commissioner where no protest was made, yet where it was denied by him no action could be maintained.

As the Court of Claims said in the *Savings Bank case* (*supra*):

"It is a novel defense to set up in a court of justice that the officers of a defendant corporation or quasi corporation have decided not to pay the demand sued upon."

The intention of Congress not to require any protest is further shown by section 3426, which authorizes the Commissioner of Internal Revenue to make regulations—

"for the allowance of * * * stamps issued under * * * any internal-revenue act * * * which through mistake may have been improperly or unnecessarily used or *where the rates or duties represented thereby have been paid in error* * * * and such allowance shall be made either," etc., "or by repaying the amount or value."

Pursuant to this section, on October 26, 1899, the Commissioner promulgated a regulation (Compilation Decisions Comm'r Int. Rev., vol. 2, # 21706), which provides in part:

"In cases where stamps have been affixed to instruments not requiring them and canceled * * * the amounts

paid in error or excess may be refunded upon claims made on form 46 accompanied by the stamps, and, where practicable, by the instruments to which the stamps have been erroneously attached, or copies thereof."

It is alleged in the petition that the statutory and departmental regulations were fully complied with (¶ V, R., p. 5).

The action was properly brought under the Tucker act.

Dooley vs. U. S., 182 U. S., 222.

All of which is respectfully submitted.

HENRY M. WARD,
For Plaintiff in Error.

PAUL FULLER,
F. R. COUDERT, JR.,
Counsel.

DECEMBER 7, 1903.

13912

13914

Supreme Court of the United States,

OCTOBER TERM, 1903.

ROBERT A. CHESEBROUGH,
Plaintiff in Error,

AGAINST

THE UNITED STATES.

No. 152.

This case comes before the court by a writ of error to the United States District Court for the Southern District of New York.

The action was brought to recover the sum of Six hundred dollars, which, under the Act of Congress of June 13th, 1898, the complainant was compelled to pay as a tax upon the conveyance of a parcel of real estate owned by him and as a condition without which such conveyance was prohibited, made punishable as a misdemeanor, and the instrument of conveyance declared invalid and of no effect, and not competent evidence in any court.

Upon a demurrer by the attorney for the United States, judgment was rendered sustaining the demurrer and dismissing the petition (Rec., pp. 3 to 7). The ground of the action is the unconstitutionality of the statute imposing the tax.

For the convenience of the court the relevant portions of the Act of June 13th, 1898, and of the Constitution are here printed:

THE STATUTE.

"On and after the first day of July, 1898, there "shall be levied, collected and paid, for and in re-

"spect of the several bonds, debentures or cer-
"tificates of stock, and of indebtedness, and other
"documents, instruments, matters and things men-
"tioned and described in Schedule A of this act,
"or for or in respect of the vellum, parchment, or
"paper upon which such instruments, matters or
"things, or any of them, shall be written or printed
"by any person or persons, or party who shall
"make, sign or issue the same, or for whose use or
"benefit the same shall be made, signed or issued,
"the several taxes or sums of money set down in
"figures against the same, respectively, or other-
"wise specified or set forth in the said schedule."
(Act of June 13th, 1898, §6.)

Schedule A:

"Conveyance: Deed, instrument, or writing
"whereby any lands, tenements, or other realty sold
"shall be granted, assigned, transferred, or other-
"wise conveyed to, or vested in, the purchaser or
"purchasers or any other person or persons, by his,
"her or their direction, when the consideration
"or value exceeds one hundred dollars and does
"not exceed five hundred dollars, fifty cents; and
"for each additional five hundred dollars or frac-
"tional part thereof in excess of five hundred dol-
"lars, fifty cents." (Act of June 13th, 1898,
Schedule A.)

"That if any person or persons shall make, sign
"or issue, or cause to be made, signed or issued,
"any instrument, document, or paper of any kind
"or description whatsoever, without the same be-
"ing duly stamped for denoting the tax hereby im-
"posed thereon, or without having thereupon an
"adhesive stamp to denote said tax, such person or
"persons shall be deemed guilty of a misdemeanor,
"and upon conviction thereof shall pay a fine of not
"more than one hundred dollars, at the discretion
"of the court, and such instrument, document or

"paper aforesaid shall not be competent evidence "in any court." (Act of June 13th, 1898, §7.)

"That any person or persons who shall register, "issue, sell or transfer or who shall cause to be is- "sued, registered, sold or transferred any instru- "ment, document or paper of any kind or descrip- "tion whatsoever mentioned in Schedule A of this "Act, without the same being duly stamped or hav- "ing thereupon an adhesive stamp for denoting the "tax chargeable thereon and cancelled in the man- "ner required by law, with intent to evade the "provisions of this Act shall be deemed guilty of "misdemeanor and upon conviction thereof shall "be punished by a fine not exceeding fifty dollars "or by imprisonment not exceeding six months, or "both, in the discretion of the court, and such in- "strument, document or paper not being stamped "according to law shall be deemed invalid and of "no effect." (Act of June 13th, 1898, §13.)

THE CONSTITUTION.

"Representatives and direct taxes shall be ap- "portioned among the several States which may be "included within this Union, according to their "respective numbers. * * * The actual "enumeration shall be made within three years "after the first meeting of the Congress of the "United States and within every subsequent term "of ten years." (Const., Art. 1, §1, subd. 3.)

"No capitation, or other direct tax shall be laid, "unless in proportion to the census or enumeration "hereinbefore directed to be taken." (Const., Art. 1, §9, subd. 4.)

"Representatives shall be apportioned among the "several States according to their respective num- "bers." (XIVth Amendment, §2.)

If the tax here in question be a direct tax the statute attempting to impose it is admittedly unconstitutional.

Contents of the Brief.

This Brief is divided into the following heads:

1. Fundamental propositions upon which the argument of plaintiff in error is based.

2. The argument that the tax is a direct tax considered on principle and as an original question.

3. Examination of the genesis and historical development of stamp taxes on conveyances of real estate in England and the United States.

4. Answers to objections and a consideration of the cases cited by the defendant in error as adverse to plaintiff's contention.

POINT I.

Fundamental propositions upon which the argument of plaintiff in error is based.

We contend:

A. The question is whether this is a direct tax; if so, it is necessarily void because not apportioned.

The category of direct taxes, within the meaning of that phrase as used in the Constitution, is determined partly by an examination of the question as an original one in the light of general, logical and economic considerations and partly in the light of the history of taxation in England and America. It is settled law that the Court will look at the real substance and effect of the tax and not be governed or influenced by the particular form or guise in which the tax is laid.

B. Property is a combination or bundle of separate rights or powers conferred by the law upon persons. The three essential rights composing the legal concept "property" are

(1) possession and the right thereto;
(2) income or yield, and
(3) alienability *inter vivos.*

The destruction or inhibition of any of these rights would be a direct destruction or deprivation of property.

C. The tax is direct because it falls directly upon one of the fundaments of property, that is to say, alienability, in precisely the same manner as a tax on land or general property falls upon the right of possession and an income tax on the right of enjoyment. Each of these latter taxes is a direct tax upon the property because upon one of the essential legal attributes which constitute property.

Take away possession or the right thereto and the basis of property fails; confiscate income and the present concept of property as consecrated by our Constitution and legal institutions is erased from our law; prohibit the power of sale and property becomes a mere emasculated right of possession known only to primitive times and to the ancient feudal system based on the ultimate ownership of all land by the crown.

D. There is nothing either in the history of the stamp tax on conveyances in England or in the United States which militates against the view that the tax here involved is a direct tax, but on the contrary this history would tend to show that the tax is really only in form a stamp tax, but a direct property tax in fact. This is also the view of the standard writers on political economy.

The decisions of this Court do not contravene appellant's view, but on the contrary the reasoning in recent cases, notably, *The Income Tax cases*, 157, 158 U.

S., *Nicol* v. *Ames*, 173 U. S., and the *Fairbank* case, 181 U. S., necessarily involve principles, the logical inference from which demonstrate this tax to be direct.

POINT II.

The argument that the tax is a direct tax considered on principle and as an original question.

Austin in his great work on Jurisprudence defines ownership as follows:

> " Section 515. The right to use or deal with " some given subject in a manner or to an extent " which though not unlimited is indefinite. * *
>
> " 518. It is a right residing in a person over or " to a person or thing and availing against other " persons universally or generally. * *
>
> " 1103. It is a right imparting to the owner a " power of indefinite user, capable of being trans- " mitted to universal successors by way of descent, " and imparting to the owner the power of dis- " position from himself. * * (Strictly speaking " and to make the definition apply to every sys- " tem of law), *disposition here must be confined to* " *an alienation to take effect in the lifetime of the* " *party entitled. The powers of alienation in ex-* " *tremis, are* in most systems of law, subject to pecu- " liar restraint."

The more recent and equally learned and scientific writer, Holland, in his Jurisprudence, page 194, says:

> " It is a great advance in civilization when law " throws around the mere fact of possession that " protection which the possessor could previ-

" ously have won for it only by his own right " hand. It is a still further advance when law " gives to a man that far ampler measure of right " over an object, quite irrespectively of his having " any actual or even constructive control over it, " which is known as 'Ownership.' The higher is " no doubt a development of the lower right. * * " The right of ownership is, however, unlimited " only in comparison with other rights over ob- " jects. In accordance with the maxim '*sic utere* " *tuo ut alienum non laedas.*' It must always be en- " joyed in such a way as not to interfere with the " rights of others and is therefore defined in the " French Code as: 'Le droit de jouir et dis- " 'poser des choses de la manière la plus absolu " 'pourvu qu'on n'en fasse pas en usage prohibé par " *les lois ou par les règlements.* (Art. 544.) * * Va- " rious attempts have been made to enumerate the " attributes or powers of an owner. He is said to " have rights '*utendi*,' '*fruendi*,' '*abutendi*,' '*fructus* " *percipiendi*,' '*possidendi*,' '*alienandi*,' *and* '*vendi-* " *candi*.' But what has to be said with reference to " the orbit or contents of the right of ownership " may be conveniently arranged under the three " heads *of possession, enjoyment and disposition.* " * * The right of disposition carries with it the " right of alteration or destruction and also *the* " *right of alienation.* (p. 196.) * * * *" Mirabeau defines property as " *un avantage conféré par les* " *conventions sociales.* (p. 152.) Recent investiga- " tors, and especially Sir Henry Maine have abun- " dantly shown that there is in early times but " little trace of individual ownership. * * * The " idea that property really belongs to a family " group and that the right of an individual is " merely to administer his share of it during his " lifetime may be said still to survive in those pro- " visions against the total disinheriting of rela- " tions which modern systems have borrowed

> " from the Roman law and less obviously in the " rights given to next of kin under statutes of " distribution. * * The principle that a man " may voluntarily select the person on whom his " property is to devolve after his death is of later " origin than the principle of intestate succession. " Such a selection had at first to be ratified by " legislative authority in order to oust the rights " of the relatives." (p. 153.)

From the above quotations it is evident that the power of disposition *inter vivos* is an essential attribute of property. It is equally fundamental with possession and enjoyment and the three together form the legal concept of property which is protected by the Constitution and which even the paramount power of Congress cannot attain. It is idle to argue that in the remote past or under the Norman feudal system once prevalent in England property was not alienable or allodial; all legal concepts and institutions are the product of evolution and development; in using the word " property " our Constitution and our laws do not mean the hut which the primitive Ayran was able to occupy so long, and only so long, as his good right hand could vanquish all comers who attempted to disturb his precarious possession, but " property," as that term is now understood and consecrated in the United States Constitution, has a fixed and definite meaning, the result of centuries of legal and social development.

We insist somewhat upon these seemingly elementary principles for the reason that we believe a tax on the power of disposition *inter vivos* (that is to say sale or conveyance) is direct, precisely as is a tax upon property generally or upon the income thereof, within the meaning of the Constitution, a direct tax. (*Income tax cases.*) Alienability cannot be considered a less essential part of property than income or possession. It is in fact a fundamental right. As the learned Mr. Justice Brown

has so aptly said (*United States* v. *Perkins*, 163 U. S., 625):

> " While the laws of all civilized States recognize " in every citizen the absolute right to his own " earnings and to the enjoyment of his own prop- " erty, and the increase thereof, *during his life*, " except so far as the State may require him to " contribute his share for public expenses, the " right to dispose of his property by will has " always been considered purely a creature of " statute and within legislative control." (p. 627.)

Numerous decisions of this Court, notably *Magoun* v. *Illinois Trust Company*, 170 U. S., 283, *United States* v. *Perkins*, 163 U. S., 625, and the recent case of *Knowlton* v. *Moore*, 178 U. S., 41, and the cases there cited, abundantly show that the right to dispose of property by testament or the right to take by intestate succession are not fundamental rights of property protected by the Constitution of the United States.

It is this distinction between the right of alienation *inter vivos* and the rights just mentioned which make inapplicable to the present case the case of *Knowlton* v. *Moore* and others which had to deal with a purely municipal right, that is to say heritability and testacy.

The criterion as to whether this tax is in principle one directly imposed upon the property transferred is easily seen by the following considerations: If Congress should enact generally that all real estate should be inalienable absolutely or only under legislative or administrative permission, it is perfectly clear that the inhibition of the Constitution against the taking of property without due process of law or without the payment of proper compensation would be absolutely violated, and this would be equally true of legislation by the States.

A very good illustration is found in the case of *Wynehamer* v. *The People*, in 13 N. Y., 378. An act

of the Legislature of New York made in pursuance of a desire to restrain the use of intoxicating beverages made it unlawful to sell certain alcoholic liquors. This was held to prevent a disposition of property by the owner and thus to virtually destroy that property, and hence to contravene Article 1, Section 6 of the State Constitution,

> " That no person shall be deprived of life, lib-
> " erty or property without due process of law;
> " nor shall private property be taken for public
> " use without just compensation."

Judge Comstock there remarked in referring to the sale of liquors (p. 384):

> " In this country the right of property in them
> " (liquors) was never so far as I know for an instant
> " questioned. In this State they were bought and
> " sold like other property. * * In short, I do
> " not understand it to be denied that they were
> " property in just as high a sense as any other
> " possession which a citizen can acquire."

After stating the objections against the use of alcohol on social grounds, he continues:

> " But if such arguments can be allowed to sub-
> " vert the fundamental idea of property, then
> " there is no private right entirely safe, because
> " there is no limitation upon the absolute discre-
> " tion of the legislature, and the guarantees of
> " the Constitution are a mere waste of words.
> " The foundation of property is not in philosophic
> " or scientific speculations, nor even in the sug-
> " gestions of benevolence or philanthropy. It is
> " a simple and intelligible proposition, admitting,
> " in the nature of the case, of no qualification,
> " that that is property *which the law of the land*
> " *recognizes as such. It is, in short, an institution*
> " *of law, and not a result of speculations in science,*

" *in morals or economy.* (pp. 384-5.) * * As property
" the right to sell them (liquors) is denied and *their*
" *commercial value is thus annihilated.* (p. 389.)
" * * When a law annihilates the value of proper-
" ty *and strips it of its attributes, by which alone it is*
" *distinguished as property*, the owner is deprived
" of it according to the plainest interpretation,
" and certainly within the spirit of a constitution-
" al provision intended expressly to shield private
" rights from the exercise of arbitrary power."
" (p. 398.)

Upon principle then, it is entirely clear that a tax upon alienability is a direct tax upon property as Mr. Justice Peckham well remarked in *Nicol* v. *Ames*, 173 U. S., 509, at p. 518.

" It is asserted to be a direct tax, because it is
" a tax upon the sale of property measured by the
" value of the thing sold, and such a tax is a di-
" rect tax upon the property itself, and therefore
" subject to the rule of apportionment. Various
" cases are cited, from *Brown* v. *Maryland*, 12
" Wheat., 419, down to those involving the valid-
" ity of the income tax, 157 U. S., 429; 158 U. S.,
" 601, for the purpose of proving the correctness
" of this proposition. All the cases involved the
" question whether the taxes to which objection
" was taken amounted practically to a tax on
" the property. If this tax is not *on the property*
" *or on the sale thereof*, then these cases do not
" apply." (pp. 518–19.)

The Court then holds that the tax was not upon the sale itself but upon the privilege of dealing at an exchange :

" A sale at an exchange does form a proper
" basis for a classification which excludes all sales
" made elsewhere from taxation." * *

> " A tax upon the privilege of selling property at " the exchange * * differs radically from a tax up- " on every sale made in any place. *The latter tax is* " *really and practically upon property. It takes no* " *notice of any kind of privilege or facility, and* " *the fact of a sale is alone regarded.*" (p. 521.)

While the question here involved has never been directly decided in this Court the foregoing extract from the opinion of *Nicol* v. *Ames* would clearly indicate the opinion of the Court to be that a tax upon all sales generally was a direct tax upon the property. Direct taxes have been defined by this Court as follows:

> " Direct taxes in a general and large sense may " be described as taxes derived immediately from " the person or from real or personal property " without any recourse therefrom to other sources " for reimbursement." *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S., 429, at p. 588.

It cannot, of course, be seriously contended that this tax is in its nature a stamp tax. We will see in examining the historical development of stamp taxation that there is such a thing as a true stamp tax, that is to say, a tax imposed under the guise of a stamp upon certain legal instruments and which tax is levied upon the instruments as such and apart from the property or transaction to which they have reference.

The Court will look at the substance of a tax and not at the form as was clearly held in the decision in the recent case of *Fairbank* v. *The United States*, 181 U. S., 283. Even the dissenting opinion in that case shows that the tax here involved which is proportioned to the amount of the transaction is not a real stamp tax. Mr. Justice Harlan there says (p. 317):

> " If Congress had graduated the stamp duty " *according to the quantity or value* of the articles " exported, there might have been ground for

"holding that the purpose and the necessary "result was to tax the property and not the "vellum, parchment or paper on which the bill of "lading was written or printed."

And again he says:

"A stamp duty has now, and has had for "centuries, a well-defined meaning. It has always "been distinguished from an ordinary tax *meas-* "*ured by the value* or kind of the property taxed. "If Congress, in respect of a bill of lading for "articles to be exported, had imposed a tax of "five thousand dollars for and in respect of the "vellum, parchment or paper upon which such "bill was written, the Courts, looking beyond "form and considering substance, might well have "held that such an act was contrary to the "settled theory of stamp tax laws, and that the "purpose and necessary operation of such legisla- "tion was, in violation of the Constitution, to tax "the articles specified in such bill and not to im- "pose simply a stamp duty." (p. 318.)

The illustration given by the learned Justice is especially apposite in this case as the stamps on realty conveyances often amounted to hundreds of dollars and sometimes went into the thousands, thus making it an absurdity to consider the tax as one upon the parchment or vellum upon which the conveyance was printed.

How far this Court in determining the question as to whether a tax is direct or not will be governed by the opinions of economists as to the shifting of the incidence of the tax from the seller to the buyer was much discussed in the famous Income Tax Cases. It is an economic question much debated and upon which economists have held various and shifting theories. The Court has held repeatedly that it will not be guided by

the views of economists upon this point and will only advert to the question of incidence as a make-weight in reaching the conclusion as to whether a tax is direct or indirect. The incidence is however, an argument which the Court will look at among others in reaching a conclusion.

This tax is a direct tax in the economic sense.

The framers of the Constitution were familiar with the "Wealth of Nations," the great standard work on economics. Their views as to what taxes were direct *i. e.*, incapable of being shifted must have been largely influenced by the opinion of Adam Smith. He says:

> "Taxes upon the transference of property from "the dead to the living, fall finally as well as im- "mediately upon the person to whom the prop- "erty is transferred. Taxes upon the sale of land "fall altogether upon the seller. The seller is "almost always under the necessity of selling, and "must, therefore, take such a price as he can get. "The buyer is scarce ever under the necessity of "buying, and will, therefore, only give such a price "as he likes. He considers what the land will "cost him in tax and price altogether. The more "he is obliged to pay in the way of tax, the less "he will be disposed to give in the way of price. "Such taxes, therefore, fall almost always upon a "necessitous person, and must therefore, be fre- "quently very cruel and oppressive. * * *
>
> "Such stamp duties as those in England upon "cards and dice, upon newspapers and periodical "pamphlets, etc., are properly taxes upon con- "sumption; the final payment falls upon the per- "sons who use or consume such commodities. "Such stamp duties as those upon licenses to re- "tail ale, wine, and spirituous liquors, though in- "tended, perhaps, to fall upon the profits of the re- "tailers, are likewise finally paid by the consumers "of those liquors. Such taxes, though called by

13921

" the same name, and levied by the same officers
" and in the same manner with the stamp duties
" above mentioned upon the transference of prop-
" erty, are however of a quite different nature, and
" fall upon quite different funds."

Smith on the Causes of the Wealth of Nations, Article 1, pp. 685, 686, 687.

The eminent John Stuart Mill, whose work is the "classic" on political economy agrees with the "father of political economy" that the realty conveyance tax is direct in its nature.

" Of taxes on contracts, the most important are
" those on the transfer of property; chiefly on pur-
" chases and sales. Taxes on the sale of consum-
" able commodities are simply taxes on those com-
" modities. If they affect only some particular
" commodities, *they raise the prices of those com-*
" *modities, and are paid by the consumer. If the*
" *attempt were made to attack all purchases and*
" *sales, which, however absurd, was for centuries*
" *the law of Spain, the tax, if it could be enforced,*
" *would be equivalent to a tax on all commodities*
" *and would not affect prices;* if levied from the
" sellers, it would be a tax on profits, if from the
" buyers a tax on consumption; and neither class
" could throw the burden upon the other. If con-
" fined to some one mode of sale, as for example
" by auction, it discourages recourse to that mode,
" and if of any material amount, prevents it from
" being adopted at all, unless in a case of emerg-
" gency; in which case as the seller is under a
" necessity to sell, but the buyer under no neces-
" sity to buy, the tax falls on the seller; and this
" was the strongest of the objections to the auc-
" tion duty; it almost always fell on a necessitous
" person, and in the crisis of his necessities.

" Taxes on the purchase and sale of land are,

" in most countries, liable to the same objec-
" tion. Landed property in old countries is sel-
" dom parted with, except from reduced circum-
" stances or some urgent need; the seller therefore,
" must take what he can get, while the buyer,
" whose object is an investment, makes his calcu-
" lations on the interest which he can obtain for
" his money in other ways, and will not buy if he
" is charged with a government tax on the trans-
" action It has indeed been objected, that this
" argument would not apply if all modes of per-
" manent investment, such as the purchase of gov-
" ernment securities, shares in joint-stock com-
" panies, mortgages and the like, were subject to
" the same tax. But even then, if paid by the
" buyer, it would be equivalent to a tax on inter-
" est; if sufficiently heavy to be of any impor-
" tance, it would disturb the established relation
" between interest and profit; and the disturbance
" would redress itself by a rise in the rate of inter-
" est, and a fall of the price of land and of all se-
" curities. *It appears to me, therefore, that the*
" *seller is the person by whom such taxes, unless*
" *under peculiar circumstances will generally be*
" *borne.*

" All taxes must be condemned which throw ob-
" stacles in the way of the sale of land, or other
" instruments of production. Such sales tend nat-
" urally to render the property more productive.
" The seller, whether moved by necessity or
" choice, is probably some one who is either without
" the means, or without the capacity, to make the
" most advantageous use of the property for pro-
" ductive purposes; while the buyer on the other
" hand, is at any rate not needy, and is frequently
" both inclined and able to improve the property,
" since, as it is worth more to such a person
" than to any other, he is likely to offer the high-
" est price for it. All taxes, therefore, and all

> " difficulties and expenses, annexed to such con-
> " tracts, are decidedly detrimental; especially in
> " the case of land, the source of subsistence, and
> " the original foundation of all wealth, on the im-
> " provement of which, therefore, so much depends."

Concluding therefore upon this point, we respectfully submit that upon principle and in its very nature the tax is direct because imposed upon the power of alienation which is one of the three essential legal rights constituting property; consequently it must fall within the same category as a tax on the possession of property, or upon its income (enjoyment). The three taxes are necessarily in the same category, *i. e.*, direct taxes. This result is inevitable if the question is to be viewed from the standpoint of logic, of economics or of judicial precedent. We can appeal to no other standards.

POINT III.

Examination of the genesis and historical development of stamp taxes on conveyances of real estate in England and the United States.

In the standard work upon the history of taxation in England (Dowell), it is stated that stamp taxes originated in England in 1694, having been borrowed from Holland where they were imposed upon all legal documents. Dowell, Vol. II, p. 62.

> These stamp taxes were on royal grants of presentations to benefices and various instruments of that class, and also for a multiplicity of other legal instruments.
>
> " The tax contained the germs of the important
> " taxes on deeds of conveyance, settlement, mort

"gage and lease, probates of wills." Dowell, Vol. II, p. 62. Stamps became *not only a method of taxing legal instruments but a method of collecting taxes of various kinds, usually excises.*

"The meaning of stamp duties in this chapter "is limited to duties on documents and writings "having a legal operation or forming necessary "steps in suits in the law Courts, briefly, instru- "ments and law proceedings. Many taxes of "various descriptions have at different times, "some when first imposed, others subsequently, "by transfer from another branch of the revenue, "been placed, for purposes of administration, "under the management of the Commissioners of "stamps, and during their continuance in that "position have been termed 'stamp duties' or "'duties of stamps.' The taxes on horses, race- "horses, stage coaches, post horses, passengers by "railway, property insured from risk of fire, on "hawkers and peddlers, pawnbrokers, appraisers, "bankers, attorneys and solicitors, proctors and "conveyancers, publicans and tavern keepers; on "hats, gloves and mittens, hair powder and poma- "tum, cosmetics, proprietary medicines, choco- "late, cards and dice; on legacies and successions "of personal property on a death, and others "have been or are *stamp duties in this sense.* In "this work *these taxes* will be found under the "heads of taxes *on persons, on property* or some- "thing analogous to property, or on articles of "consumption notwithstanding the fact that they "may have been at some time unstamped 'duties "of stamps,' as taxes misplaced in the stamp "branch were termed in revenue language, or "'stamp duties upon matters or things' as they "are termed in several Acts of Parliament in "contradistinction to stamp duties upon instru- "ments." Dowell, Vol. III, 321.

The tax on a conveyance or deed was originally a fixed amount upon the number of folios used.

> "The duties were charged for every skin or piece "of parchment or paper upon which any instru- "ment was written, and in order to prevent any "curtailment of length with a view to avoid pay- "ment of the duties, deeds and writings were re- "quired to be engrossed and written in the man- "ner theretofore customary. *The tax was, there- "fore, to a certain extent a tax on the amount of "paper used.*" Dowell, Vol. III, 324.

In 1714 for the first time appears the principle of percentage tax on the amount of the transaction.

> "By this Act (1714) the duties on grants of money "and offices were increased by reference to the "amount granted and the value of the office. "This is interesting as the commencement of *ad "valorem* charges, that is to say, charges having "reference to the magnitude of the transaction as "opposed to the length of the instrument." (p. 326.) The deed duty was not, however, changed from an ordinary stamp tax to percentage tax. Although Pitt attempted to do so he failed.
>
> "In 1795 the duty upon deeds was raised to 10s. "an amount which was payable in respect of "every skin on which the deed was engrossed, the "number of words or folios to be written on a "single skin of parchment was still limited by "law and therefore *in principle the tax continued "to be a tax on deeds by reference to the length and "such had been up to this date the governing prin- "ciple of the stamp tax.*" *Id.* pp. 329–330.

The English Stamp Act of 1870 consolidating the various stamp duties imposes a percentage duty on conveyances on sale which is defined as "any instrument whereby any property upon the sale thereof is

legally or equitably transferred to or vested in the purchaser."

It thus appears that the development of the percentage or progressive stamp tax is a late one in English law and not until quite recently has it been applied to deeds or conveyances of sale. The question whether such a tax was not a direct tax did not and could not arise as a legal question in England as the English Parliament is, of course, bound by no limitations in this respect as is the Congress of the United States. The history of British taxation does not show the adoption of any definite rule or scientific classification of direct and indirect taxes. Dowell, for instance classifies taxes as follows:

> First. Taxes on persons, capitation or occupation.
>
> Second. Property, land, income, movable, death duties, property sold by auction and property insured.
>
> Third. Taxes analogous to a property tax, for instance, hearth-money, window tax, inhabited houses, taxes on domestic establishments, persons having horses, dogs, servants, guns, etc.
>
> Fourth. Stamp duties on legal instruments and contracts. Table of Contents, Vol. III.

In the United States this tax on real estate conveyances has never been imposed but once before. While the laws of 1797 (Chap. 11, Act. July 6th) as well as the laws of 1813 (Chap. 53, August 2nd) provided various progressive stamp taxes, taxes on bonds, promissory notes, etc., conveyances or sales are not included. It was reserved for the omnibus and omnivorous civil war tax law of 1862, 12 Stat. at L., 479, to lay a tax on

> " any deed, instrument or writing whereby any
> " lands, tenements or other realty sold shall be

" granted, assigned, transferred or otherwise con-
" veyed to or vested in the purchaser or purchas-
" ers, or any other person or persons by his, her
" or their direction."

It is thus evident that there is nothing either in English history or the practice of the government save the statute just mentioned which could serve as a precedent for contending, as has been contended in other tax cases in this Court, that long continued congressional or administrative usage should be considered as an element in determining the constitutionality of the tax.

In the *Fairbank* case, although the Acts of 1797 and 1813, as well as that of 1862, had provided for a tax on foreign bills of lading, the Court nevertheless held that such action on the part of Congress in no way precluded it from examining into the real nature of the tax itself and used the following language, which is even more pertinent to this tax, the sole legislative precedent for which is to be found in the tax of 1862.

" It will be perceived that these stamp duties
" have been in force during only three periods:
" First, from 1797 to 1802; second, from 1862 to
" 1872; and third, commencing with the recent
" Statute of 1898. It must be borne in mind also
" in respect to this matter that during the first
" period exports were limited, and the amount of
" the stamp duty was small, *and that during the*
" *second period we were passing through the*
" *stress of a great civil war or endeavoring to*
" *carry its enormous debt; so that it is not*
" *strange that the legislative action in this respect*
" *passed unchallenged.* Indeed it is only of late
" years, when the burdens of taxation are increas-
" ing by reason of the great expense of govern-
" ment, that the objects and modes of taxation
" have become a matter of special scrutiny. But
" the delay in presenting these questions is no ex-

" cuse for not giving them full consideration and
" determining them in accordance with the true
" meaning of the Constitution."

Fairbank v. *U. S.*, 181 U. S., page 311–12.

The above case held that a tax of 25 cents on bills of lading of goods intended for export, is a tax on the export itself, and therefore obnoxious to the constitutional restriction as to the taxation of exports. The reasoning of this case to the effect that form and not substance will be looked into is very apposite here.

Mr. Justice Brewer cites among other cases, that of *Brown* v. *Maryland*, 12 Wheat., 419, in which a licensed tax upon the importers of foreign articles was held to be in fact, though not in form, a tax on imports and therefore one which a State could not constitutionally levy. He quotes with approval the language of Chief Justice Marshall as follows :

" All must perceive, that a tax on the sale of an
" article, imported only for sale, is a tax on the
" article itself. It is true the State may tax occu-
" pation generally, but this tax must be paid by
" those who employ the individual, or is a tax on
" his business. * * * This the State has a right to
" do, because no constitutional prohibition extends
" to it. So a tax on the occupation of an im-
" porter is, in like manner, a tax on importation.
" * * * This the state has not a right to do, be-
" cause it is prohibited by the Constitution."

It is a misapprehension to assume as did the learned District Judge in the case of *Thomas* v. *The United States*, that *Brown* v. *Maryland*, the *Fairbank* case, and those of a similar class are cited by us as authority for the proposition that because a tax on an importer or an export bill of lading was held to be a tax upon an import, that by parity of reasoning a tax on a deed of conveyance, is therefore necessarily a

direct tax. It is not contended that any tax falling within the export prohibition clause of the Constitution is necessarily a direct tax. These cases are not cited, with any such purpose, but to show that the Court will look into the real nature of the tax whatever its form.

In this case a similar examination of the tax shows it to be a tax upon the power to sell, which is an integral property right, and by taxing which, property is directly burdened within the meaning of the words "direct taxes."

POINT IV.

Answers to objections and a consideration of the cases cited by the defendant in error as adverse to contention of plaintiff in error.

The objections which will probably be urged by the learned Attorneys for the Government in opposition to our position have been succinctly set forth by Circuit Judge Thomas in the case of *United States* v. *Thomas*, Fed. Rep., recently decided, upon the question as to the constitutionality of the tax on transfer of stock certificates. While some of the questions in that case have no bearing upon the case at bar by reason of the nature of corporate certificates many of the arguments used by the Circuit Judge in upholding the validity of the tax therein involved would apply, if sound, equally well to the tax here in question. His objections considered *seriatim* as stated, by him, are:

1. "The expressions in the cases where no tax was "valid, that a tax on vendors or occupations, or "shipping bills, was a forbidden tax on the com- "modities, would, if applied to instances where "the taxing power has been uniformly recognized, "vitiate the same."

This is based upon a misconception of the position of the plaintiff in error. While a tax upon a foreign importer is a tax upon the thing imported, and therefore invalid, we do not contend that a tax on the occupation of importers is itself a direct tax; it may be considered an excise or occupation tax such as has been imposed in England from early times and has been in force in the United States several times since the adoption of the Constitution. This distinction is pointed out by Mr. Justice Brown in his dissenting opinion in *Pollock* v. *The Farmers' Loan & Trust Company*, 158 U. S., 691. In that opinion he reviews the cases from *Brown* v. *Maryland*, 12 Wheat., 419, down to *Cook* v. *Pennsylvania*, 97 U. S., 566, with a view to indicating that the question there involved was not as to whether a tax was direct or not, but whether it in reality affected the prohibited thing, that is, imports, exports or interstate commerce.

We have cited these cases simply with the purpose of showing that this Court will examine the Constitution in the light of its plain meaning, looking at each question from the standpoint of substance rather than form, and not feeling itself in any way bound by congressional or administrative usage unless the question is in itself so doubtful or ambiguous as to make usage valuable as a make-weight in reaching a conclusion.

We state thus candidly our views as we do not desire to attempt to hold untenable positions but consider that the cases adverted to, while not directly deciding the propositions contended for by appellant, necessarily and logically sustain his reasoning.

2. The second objection formulated by the Circuit Judge is as follows:

> "In whatever form a tax is laid its payment "must be primarily from the taxpayer's prop- "erty. In this sense the same is the subject of "the tax."

This is a truism with which we have no quarrel. Every tax must fall ultimately on property, even a capitation tax, but the tax here in question *is levied directly upon the exercise of a right of property*, precisely as the tax found unconstitutional in the Income Tax cases was imposed upon another equally essential right of property, namely, the collection of the income or earnings of real estate or personalty.

3. Judge Thomas' third objection is that:

> " A statute providing for a direct tax with cer-
> " tainty burdens by lien or generally the tax
> " payer's property, and in theory appropriates *pro*
> " *tanto* his income and encumbers his principal,
> " while a statute providing for a tax on sales in-
> " terrupts no enjoyment of property, makes no
> " exaction from principal or income beyond
> " placing a tax upon a transaction attending the
> " disposition of property."

This objection seems to us to be unsound in its premise because a tax upon the power of sale necessarily encumbers the property. Should the power of sale be prohibited by law, property would certainly be much injured in value and would in fact cease to be property, so in a proportionate degree any encumbrance placed upon alienability must equally and progressively diminish the value of property (*vide* citations *Wynhamer* v. *Peo.*, *supra*). This seems to us too clear from the standpoint of ordinary deduction to require further comment.

4. The Judge's fourth objection is:

> " That the right to tax a pursuit, occupation or
> " business involves the right to tax the same in
> " whatsoever limited degree it is adopted and fol-
> " lowed, so that a right to tax one for carrying
> " on the business of selling shares of stock involves
> " the power to tax the sale of a single share of
> " stock."

This objection seems to us to radically ignore the basis of a business or occupation tax, which is in its nature a tax upon a license or privilege exercised by a certain class of persons. Probably the oldest occupation tax was that upon attorneys at law, and in the history of English and American taxation it has been extended to various other occupations.

> " A tax on the legal profession imposed, by Pitt,
> " in 1785, the same year as the taxes on shops and
> " pawnbrokers, formed one of the annual *license*
> " *taxes* he was at this date endeavoring to intro
> " duce into our fiscal system." Dowell, Vol. III, p. 20.

To hold that the owner of property by exercising one of its fundamental attributes thereby becomes a business man exercising a privilege or license and taxable on such, seems to us wholly fallacious. It ignores the pith of plaintiff's contention which is that any tax is direct which is imposed upon one of the necessary incidents of all property ; the mere exercise of any one of which is an ordinary attribute of ownership regardless of whether it be exercised as an incident to a trade or calling or merely for the owner's immediate gratification and support.

5. His fifth objection is :

> " That the right to lay an unapportioned tax on
> " sales is not limited to sales of commodities
> " whereby the tax may be shifted in whole or
> " in part, and the conflicting views of the econo-
> " mists should influence the legislature and not
> " constrain the courts."

A tax upon sales of ordinary commodities has never been considered by economists a direct tax upon property, because the consumer was thought to pay the tax. While economists may not be wholly in ac-

cord on this point, taxes on spirits, tobacco, salt, sugar, etc., have always been considered as falling within the category of excises or indirect taxes, and the question was so absolutely and definitely settled by the trend of English tax legislation, prior to the time of the adoption of the Constitution, that there could have been no question in the minds of the framers that the word "direct" taxes did not include such excises.

In the recent case of *Patton* v. *Brady*, the point was suggested that a tax upon a manufacturer of tobacco is in reality a direct tax in the meaning of the Constition, to which Mr. Justice Brewer answered:

> "But as we have seen, it is not a tax upon prop-
> "erty as such but upon certain kinds of property,
> "*having reference to their origin and intended*
> "*use.*"

6. The Judge in the Thomas case appeals to the legislation of 1862 as showing a similar instance of taxation. This objection has already been adverted to in a preceding point.

7. His seventh objection is that

> "taxes on sales or transfers of property are indi-
> "rect within the holdings of the Supreme Court."

He relies to sustain this view largely upon the case of *Knowlton* v. *Moore*, 178 U. S., 41, which held, that a legacy or inheritance tax was levied neither directly upon the property itself, nor upon the power of the State to regulate inheritances, but upon the act of transmission itself, or upon the consequence of death which is the generating source of the tax. This case can have no application to the case at bar, because the act of transmission is a privilege accorded by the State to the heirs or devisees of the dead man. Such a privilege is not a property right as understood within the meaning of the Constitution of the United States.

If the State abolished it, such law would not fall within the condemnation of XIV Amendment. *Magoun* v. *Illinois Trust Company*, 170 U. S., 283, and, consequently, the tax falls not upon one of the three essential attributes of property but upon the right or privilege accorded by the State to legatees or devisees, which right or privilege is a comparatively recent creation of municipal law and not a fundamental property right. While Mr. Justice White suggests that indirect taxes may be regarded as a tax on an act or event this rule could not apply to an act which is a necessary incident to mere ownership. *Knowlton* v. *Moore*, 178 U. S., 41.

The eminent President Hadley of Yale says in regard to direct and indirect taxes:

"There is no doubt that there is a real distinction between these two kinds of taxes; but there is a great deal of doubt whether the distinction just drawn (which is that of Smith and Mill) correctly marks the line between them. * * *

"In view of this difficulty, Continental writers have generally preferred to define direct taxes as those which are assessed on persons (or property) and indirect taxes as those which are levied on acts. This is correct enough in its practical applications. But *it fails to indicate any real distinction of principle and therefore in a considerable number of cases which can be regarded in either light* (*e. g. taxes on occupations*) *we cannot use the definition as a criterion.* We decide on unformulated grounds to which class a tax belongs and interpret our definition accordingly." (Economics, page 461).

8. The last objection is that the tax is difficult if not impossible of apportionment. This argument, however, would have applied quite as well to the income tax and was urged with great vehemence in that case but did not find favor with the learned Court.

Concluding, therefore, we contend that in its nature the tax is directly and really upon property; that there is nothing in the historical genesis or development of the tax to show that it has ever been considered otherwise; and that further the *Income Tax Cases*, *Nicol* v. *Ames*, and *Fairbank* v. *U. S.* cannot be reconciled with any other theory.

All of which is respectfully submitted to the Honorable Court.

November, 30, 1903.

FREDERIC R. COUDERT, JR.,
PAUL FULLER,
Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

ROBERT A. CHESEBROUGH,
Plaintiff in Error,

vs.

THE UNITED STATES.

No. 152.

WASHINGTON, D. C., Thursday, December 3, 1903,
1.30 o'clock P. M.

The above-entitled cause came on for hearing at the above date and hour, the Chief Justice and all the Associate Justices being in attendance.

Present on behalf of the plaintiff in error, FREDERIC R. COUDERT, JR., Esq., and PAUL FULLER, Esq.
Present on behalf of the United States, MILTON D. PURDY, Esq.

Argument of Frederic R. Coudert, Jr., Esq., on behalf of the Plaintiff in Error.

MR. COUDERT: If the Court please, the statement of facts in this case is very simple. There is a point of Constitutional law involved here, and nothing else. The case comes before this Court on a writ of error, to the United States District Court for the Southern District of New York, sitting as a court of claims under the Act of Congress.

This is an action by the plaintiff to recover the sum

of $600 which was paid for the purchase of stamps, on a conveyance of real estate, under the War Revenue Law of 1898, under compulsion of the law, which threatened him with fine and imprisonment and the invalidity of the conveyance, if he did not pay the tax. The tax was paid, he sued to recover it back, after application to the collector and refusal to refund; the Government demurred, the demurrer was sustained, and as the case involved a constitutional question, of which this Court has jurisdiction—whether exclusive or not, I do not know—the case came here directly. Therefore, there is no question whatever of jurisdiction.

I do not wish to weary the Court by reading, but if they will look at the statute, on pages 1, 2 and 3 of the brief in this case, they will see the exact question of law here involved.

On page 1 the statute begins: "On and after the first day of July, 1898, there shall be levied, collected," and so on, "in respect of the several bonds, debentures, or certificates of stock, and of indebtedness and other documents, instruments, matters and things mentioned and described in Schedule A of this Act, or for and in respect of the vellum, parchment or paper upon which such instruments, matters or things or any of them shall be written or printed," &c.

That is the general clause that precedes the specific clauses imposing the taxes on the various instruments.

That was the general clause of the war revenue law that was mentioned and involved in Fairbank *v.* The United States, and in Nicol *v.* Ames. The particular schedule which we claim offends the Constitution, and upon which we base this case, is Schedule A: "Conveyance: Deed, instrument or writing whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed or vested in, the purchaser or purchasers or any other person or persons, by his, her or their direction, when the consideration or value exceeds one hundred dollars," and so on. Briefly, it is one dollar a thousand, and of course, with large conveyances, the sum is very great indeed, and the tax

has mounted up to thousands of dollars in certain cases.

The statute provides: "That if any person or persons shall make, sign or issue, or cause to be made, signed or issued, any instrument, document, or paper of any kind or description whatsoever, without the same be duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than one hundred dollars, at the discretion of the Court, and such instrument, document or paper aforesaid shall not be competent evidence in any court."

And the next section goes on to say that, in addition to the criminal punishment and incompetency as evidence, the document, if not stamped, shall also be invalid as a transfer, which is equivalent, of course, to saying that no transfer of property, lands, tenements, or hereditaments is possible in the State of New York unless this tax is paid. The result is that either you pay the tax, or you are deprived of the property right of alienation.

There is a preliminary question which I have not adverted to in the brief, because I had not assumed that the Government would raise it, as it seemed to us to have no serious foundation. I will advert to that first and then discuss the constitutional question.

The Government, as I have just learned from the solicitor's brief, claims that as the plaintiff purchased the stamps and put them on the conveyance, that therefore that was a voluntary gift, and that the Court must assume that he meant to contribute that amount, in a charitable spirit, to the welfare of the Government of the United States. And there being no compulsion, so says the other side, he was therefore a volunteer, and it must be presumed, as a matter of law, that he wanted to pay it, and that he paid it from purely philanthropic motives.

Well, that view does not seem to me wholly a common-sense view. If he had not paid the tax, he could not have sold his property, because he could not have passed

title to it. No title company would have passed the title, and no purchaser would have taken it. And even assuming that he found a company unwise enough to pass the title, or a purchaser simple enough to take it without the stamps, he would then have been subjected to an indictment, a fine or perhaps imprisonment, for violating the statute. The conveyance would have been considered invalid, and he might have waited two or three years before the matter came before reaching this Court to see whether the law was Constitutional.

In the meantime he had the choice of losing the benefit of his property or of being prosecuted for crime unless he affixed the stamps.

The choice was not a very cheerful one, and most men would make up their minds very quickly to impose the stamp on the document, under the compulsion of the law.

This question, or one absolutely similar in principle, has been passed upon by this Court in the case of Swift *v.* U. S. in the 111th United States. In that case, the Court said that the statute prescribed the using of stamps, and that the parties were not on an equal basis; that a man must not necessarily interrupt his whole business, and lose all the value of his property, in order to avoid the inference that his payment was voluntary. The protest, as I understand it, in a case of this kind, would be without value, and a mere formality, because after all, protest is nothing but an indication that a man does not make a voluntary statement. The common law protest—not statutory protest—is purely evidentiary; nothing else. Where the statute says: "You have to go to jail or do a certain act," it cannot be presumed that a man must be forced to go to jail, in order to express his protest against a stamp duty or other requirement. Therefore we claim, on the common-sense view of the question, and upon the view which this Court has already taken in the Swift case, that this claimant had no option, and cannot be considered a volunteer. We say that such a result would be harsh and arbitrary, and in addition, that it

would be opposed to the ordinary jurisprudence of this and other courts.

Therefore, the question that arises is simply this: Whether a tax upon a transfer of all real estate, regardless of time, place or manner, is a direct or an indirect tax, within the meaning of the Constitution. If it is a direct tax, the statute is unconstitutional, because the tax was not apportioned. And we claim that it is a direct tax. We claim that it is clearly a direct tax, and I will state here the propositions upon which we base that argument. If I seem to be a little elementary in analyzing the elements which comprise all property, I will have to rest upon the saying of Lord Coke, "Melius est petere fontes quam sectari rivulos"—"We had better go to the sources rather than follow the by-streams."

What is property? As I understand property, it is a volume or bundle of rights which the law gives or secures to the owner. The mere physical possession of a thing, outside of the law, gives a man no rights whatever. The hut that the primitive Aryan occupied might have been taken away from him at any moment, if some other primitive man with a stronger arm had come along. But, gradually, the community enveloped that possession in a kind of protection, and the hut which he had originally occupied became property, and it could not be taken away from him. Why? Because the community willed that it should not be.

This evolution of the ages, which has resulted in what we to-day term property, makes of property a bundle of rights and correlative duties. What are those rights? As I understand them, they are: the right to possession, that is, the elementary right of property, on which the others are based; the right to the income, or yield, from that possession, and the right to transfer that property to another; in other words, alienability *inter vivos*. Take away any one of those elements, strike out any one of them, and what we term property, what the Constitution of the United States terms property, ceases to exist as such. It becomes something different. It may resemble the more primitive form, so that it might have

been considered property ages ago; but to-day, if one of those elements were removed, property, as such, as known to the law, would cease to exist, and we would revert more or less to an earlier and more barbarous conception, in which a man had no full right to property as known to our law.

Therefore, I say, anything that detracts from or falls upon and directly and irrevocably affects possession, income or alienability, strikes property; there is no escape from it.

I contend, as our fundamental proposition, that a tax upon a transfer of real estate is a tax upon the real estate itself,—a direct tax. Why? Because it strikes alienability,—one of the rights to property. A tax on a man's possession, that is, on the ownership, as such, by reason of possession, is a direct tax, as has been held, and is, of course, perfectly clear, under the decisions of this Court. A tax on the income of property, the second element that goes to make up the bundle of rights which we call property, is a direct tax, because the income is an inseparable part of the property. Strike the income, and you strike the property.

Therefore, as a necessary corollary to those two principles about which there is no question, a tax on the alienability of that property, the third element of the bundle, is a tax upon the property itself, because you cannot conceive of property, under American law, without the right of free transfer *inter vivos* which is granted by the Constitution.

We claim, therefore, that upon principle, considered as an original question, in the view of logical, legal and economic principles, that that tax is and must be a direct tax. There are no considerations which we can invoke other than those which are either legal, logical or economic.

It is a direct tax on principle, because it is a tax on one of the three necessary elements of property.

There was a case some years ago in the State of New York, in which a law of the legislature of the State prohibiting the sale of liquor was held to be unconstitu-

tional, because the court said: If you take away the power to sell the liquor, you take away its value. You cannot take away that element, without destroying the property. As soon as you do that, it becomes valueless, or almost so. You might as well take away the possession, or the income from the property, as to take away the right to sell it. It is a direct attack upon and it is a direct destruction of property. (Wynhamer *v.* The People, 15 N. Y.)

There the power of alienability was absolutely held to be a part of the property, which you could not touch or affect without affecting the property.

Is there anything in the jurisprudence of this court, is there anything in the history of English or American law, that would militate against such a conclusion as that? It seems so plain, so obvious, so necessary, that we are brought very quickly to the consideration of the question whether there can be any rule of law to the effect that a tax on possession and income are direct, while a tax upon alienability is indirect.

Has the law reached so logically anomalous a result, so impossible a result? If it has, we bow to the majesty of the law, and say that if the question has been adjudicated, we can say nothing further. Let us, therefore, examine the authorities and see whether that is the case.

As I understand it, the conception as to what is a direct tax, within the meaning of the Constitution, must be determined by an examination of what the framers intended by the words "direct tax." If they had a definite coherent intention in their minds, that is the intention that this Court will enforce, and no other. Therefore, with a view of obtaining the intention of the framers on that point, of getting at what was in their minds when they said "direct tax," of finding out what idea they had as to what particular taxes were included in that category, I have examined in my brief somewhat fully the history of the English law as to this particular tax. I will not go into it fully now. I

will not weary the court with it, or with any of the citations from the historic writers, but the point about it is this: that in the English law, this tax upon deeds of real estate was a peculiar tax. There is little or no analogy to it in the other taxes, the usual excise or stamp taxes.

The first tax, a tax upon deeds of real estate, was about 1704. A certain amount was required to be paid on each deed. It was a fixed amount. The conveyance might be for a hundred thousand pounds or ten pounds, but the amount of the tax was fixed. It was clearly and absolutely a stamp tax, a tax on the parchment, or vellum. It was one of the taxes that had been brought over from Holland during the long struggle with France, when England needed money, and began to tax everything. They adopted the Holland system, and taxed all legal instruments, all instruments to which the law attached a legal sanction. They taxed deeds; so much for every deed.

Then, about the middle of the eighteenth century, came a slight modification. They wanted more money, so they proportioned the tax, not to the amount of the property transferred, as is done in the law here, but to the number of skins going to make up the deed—ten shillings a skin. Then, lest ingenious lawyers would shorten the deed too much, they enacted that the form of deeds must not be changed. They went on and collected the tax in that way down to a period subsequent to the adoption of the Constitution. A little before 1800, Pitt introduced a bill to proportion the tax to the amount of property involved. That was a principle that had been adopted about 1794, as I remember it, by which, in certain cases,—benefices conveyed by the king, advowsons, and so on—the tax was proportioned to the amount involved in the transaction. And, as Dowell says in his History of Taxation, this was a new principle that had come into the English law of taxation, from Holland—*ad valorem* taxes.

That principle, however, was not applied to deeds.

Pitt's attempt to make it applicable to deeds failed,—why, I do not know. I can find no record in the debates on the subject, but he failed, and the old tax on deeds, at so much a skin, which was a true stamp tax, a tax literally on the parchment or vellum, proportioned to the amount of the parchment and vellum, remained in force for a very long time—when finally Parliament applied the *ad valorem* principle to conveyances, and the English law now is virtually the same as the law of 1898 here in question.

Therefore I contend that the history of the English law shows that the *ad valorem* principle was a new and rather recent one; that there is nothing whatever in the English law to show that the English parliament, or the English law-makers, considered that this particular tax—I am not speaking of any of the other stamps, or excise—was not a direct tax upon property.

Of course, in England they have never endeavored legally to make any distinctions between direct and indirect taxes. They tax everything. As Sydney Smith said, speaking of the long struggle with Napoleon, they taxed everything that a man put on his back, everything that a man put in his mouth, and everything else. There was no legal or constitutional restriction. There was no legal term which classified direct taxes. When the taxes were commented upon by text-writers, some of the taxes would be considered by one writer as direct taxes, and by others would be considered as indirect taxes in accordance with the view taken by the writer of what was really an economic question. There was no legal criterion by which to judge of the taxes as to whether they were direct or indirect.

What, then, was the criterion under the English law? Because, if we get the English law criterion as to direct and indirect taxes, at least if we get the canon of construction which they had in their minds at the time of the adoption of the Constitution, we can come pretty close to finding out exactly what the framers of the

Constitution meant, because they were familiar with English law, and with any politico-economic feature of it. Hence if we can find that out, we can get their conception of what was a direct tax and what was an indirect tax.

As I have said, there was no legal conception, no legal definition of direct and indirect taxes, and the term, after all, is not a legal term at all. The taxes were invented before the scientific theories classifying them were thought of. The taxes were in existence before the economists invented the classes, and the terms "direct" and "indirect" taxes.

Therefore, the distinction was and must have been mainly an economic concept.

The Court thereupon took the usual recess.

AFTER RECESS.

MR. COUDERT: If the Court please, when the Court took the recess, I was asking how we were to obtain any rule by which to judge of what were considered direct taxes by the framers of the Constitution. I took the English law and showed that there was no scientific classification in the English law, and that none was necessary.

Dowell, the historian of English taxation, classifies taxes as (1st) taxes on persons, capitation or occupation; (2d) taxes on property, land, income, movable, death duties, property sold by auction, and property insured; (3d) taxes analogous to a property tax, for instance, hearth-money, window tax, inhabited houses, taxes on domestic establishments, persons having horses, dogs, servants, guns, hair powder and wigs, in a class by themselves. Then he makes a fourth classification of stamp duties on legal instruments and contracts.

There is no attempt at scientific classification whatever.

There was thus no legal classification of taxes at the

time of the adoption of the Constitution. Now, what was the distinction between direct and indirect taxes based on? It was based upon something. There must be some rules by which we can ascertain that. If one had asked the first man he met on the street what a direct or indirect tax was, he in all probability would have obtained no answer. There was no public opinion on the subject, no fixed public views on the question of direct or indirect taxes, and therefore the only persons who had thought about the matter, who had endeavored to make the distinction between direct and indirect taxes, were the economists or thinkers who wrote on general public law questions.

It is always difficult to trace the history of an opinion—but this question was certainly one of class opinion—the opinion of a small body of experts who invented the distinction or fixed its meaning.

I have no brief from the economists. A great many things have been said about the economists, and their different views as to the shifting incidence of taxation and so on; but, as a matter of fact, at the time the Constitution was adopted, in England and the United States there was no definite criterion whatever between direct and indirect taxes, except that of the economists. It was an economic rather than a legal classification.

Therefore, in order to find what a direct tax was, or an indirect tax, we have to go and find out what was generally the meaning of those terms among the class of persons who might be denominated economists and thinkers on politics.

I now revert to the history of this particular tax. In the United States, this tax on deeds of conveyances of real estate has only been enforced once. The early taxes, so-called excises and stamp taxes, of 1797 and of 1813, did not contain any clause taxing the alienability of real property. The only instance of this tax that we have is in the general, omnibus and omniverous revenue law of 1862, which taxed everything, under the stress of Civil War. This tax was not there apportioned.

That is the sole instance that we have in our history, of this tax on conveyances of real estate. That, of course, cannot furnish any precedent by which this Court would be guided in the interpretation of the question as to whether this was a direct or an indirect tax.

Referring to taxes on export bills of lading, which are found three times in our legislation, 1797, 1813 and 1862, this Court, speaking through Mr. Justice Brewer, said that the fact that those taxes had been imposed three times by Congress was no reason whatever for the Court considering the taxes constitutional. I cite from what he says: "Indeed, it is only of late years, when the burdens of taxation are increasing by reason of the great expense of government, that the objects and modes of taxation have become a matter of special scrutiny." And he says that it is indifferent that for a hundred years those taxes have been at various times on the statute books, that the Court will look into the real substance of the question and determine whether they are constitutional or unconstitutional, and if they are clearly unconstitutional, as was the export bill of lading tax, the Court will settle that question without reference to the statute. (Fairbank case.)

How much stronger is the case here, when, instead of having instances spreading over a hundred years, we have only one exceptional instance in our history of this particular tax, which only endured for three or four years, and which was imposed during the stress of the Civil War, when everybody paid every tax, out of patriotism, and when nothing was questioned.

So that, in our law, there is absolutely no real precedent from which we can say that the intention of Congress, or that the trend of legislation and administrative practice was to consider taxes on the alienability of real estate as indirect taxes. Consequently, neither the English law nor American legislation have determined this question in any way, or affected it in any way whatever. Therefore, unless there are some decisions of this Court

the other way, this Court will take up the question and look at the fundamental nature of the tax to determine whether it be a direct or an indirect tax within the intention of the framers and the meaning of the Constitution.

JUSTICE PECKHAM: Would the same practice apply in regard to putting on a stamp for the sale of personal property?

MR. COUDERT: It seems to me, if your Honor please, that if the stamp were placed by law upon all sales whatever of personal property, without any regard to time or place, as your Honor said in the case of Nicol *v.* Ames, not upon a sale at a particular place, but upon all sales generally, without regard to time or place, that would be a tax upon the power of sale, a necessary incident of property, and therefore a direct tax. I think that is quite clear, from a logical standpoint, and I think it is indicated in Nicol *v.* Ames, to be the real substantial distinction.

JUSTICE PECKHAM: Therefore, the law providing for a stamp in connection with those sales of personal property would be void?

MR. COUDERT: As far as it relates to *all* sales. There are a number of provisions—a tax on the privilege of auction sales, or shares of stock——

JUSTICE PECKHAM: But I am speaking of taxes on sales of personal property.

MR. COUDERT: They would be void, and be quite analogous to the income tax imposed upon the corpus of all personal property, which was considered to strike the income, and therefore the property itself.

JUSTICE WHITE: How would it be with a tax on bank checks and drafts? Is not that, under your theory, a tax imposed on a transfer of just so much money?

MR. COUDERT: I am glad your Honor asked that. I think that that is somewhat different. Those are also taxes imported into England from Holland. They were taxes on legal instruments—promissory notes and drafts, judicial documents and so forth, and they were looked

upon as, in the first place, pure stamp taxes, taxes on the parchment or vellum. Then they were also taxes on instruments which the law had given, as a privilege to the individual to use. I think that, for that reason, those taxes are entirely distinguishable from taxes which every man, as mere owner, must pay. It is only the man who chooses to avail himself of the privilege of using a promissory note, and the particular advantages that are given to negotiable paper by the courts and the law, who is properly subject to the tax. They have been always considered true stamp taxes. Such taxes are not upon property at all but upon the use of certain instruments invested by the law with peculiar advantages. A man can dispense with a check book; he cannot enjoy his property and really own it if prohibited from transferring it, and I do not suppose that there was very much doubt in the minds of the Framers at the time of the adoption of the Constitution that such taxes were indirect taxes, and properly stamp taxes. Opinion seems to have been quite settled on that point.

JUSTICE WHITE: You have already said that you must determine what was in the minds of the framers by going to the economists.

MR. COUDERT: I was going to that point.

JUSTICE WHITE: The answer, therefore, is to go to the economists, and not to go to see what the framers thought.

MR. COUDERT: But what they thought was largely predicated on the economic thought of the day.

JUSTICE WHITE: Then it is a question as to what the economists thought, and it is a question whether they did not think that a tax on the instrument of sale of personal property, or on a check, or a draft, was a direct tax.

MR. COUDERT: The economists have said that any taxes of that kind, taxes on particular commodities, or on particular sales of particular property, are almost always shiftable; that the incidence of the tax was shiftable, and I have cited in my brief Adam Smith,

"the father of political economy" whose writings were in the minds of the framers at the time of the adoption of the Constitution, as the Court has said in the income tax cases.

JUSTICE WHITE: Take the case of a bank check. Is that shiftable, in the sense meant by the economists? That is the question that was put to you. Have you any statement from the economists to show that if I should draw a check to A to which I must affix a stamp of five cents, that I can shift the burden to the man to whom I give the check?

MR. COUDERT: I answer, as far as those instruments are concerned, the question as to shifting is indifferent. In England, for instance, a tax on parchment was always construed as a true stamp tax. That is, the tax was upon the material making up the instrument itself.

This Court has differentiated—as your Honor's question reminds me—between a true stamp tax and a tax on the property itself. In the Fairbank's case, it was held that a tax of 25 per cent. on a foreign bill of lading was a tax on the export itself; that it was a fiction and a subterfuge to call it a tax on the parchment or vellum. The minority did not take that view. They said that it was a true stamp tax, in respect of being a tax on the parchment or vellum. Mr. Justice Harlan, in delivering the dissenting opinion, said that if this tax had been of a large amount, say five thousand dollars, or if it had been an *ad valorem* tax, then the case would have been different, and the tax would have been not a true stamp tax on the parchment or vellum, but a tax upon the export. That case differentiated very clearly the difference between a true stamp tax and a tax levied under the guise of a stamp tax.

Dowell, in his work on Taxation, says a great many taxes that were not true stamp taxes at all were classed as such because they came under the jurisdiction of the commissioners of stamps, the stamps were only a method of collection. He says, however, that they were not true stamp taxes, at all. Direct taxes, indirect taxes,

property taxes, taxes analagous to property taxes, or true stamp taxes may all be collected by a stamp duty.

For instance, they had many years ago in England, a tax which was the cause of much Parliamentary discussion, on all papers issuing from the courts, on all orders and judgments and so on, a tax such as they have in France to-day; that was considered a stamp tax, a tax upon a piece of paper to which the law gives a certain privilege or advantage, or opportunity. But a tax on *all* sales, wherever made, is a tax on all property directly and besides its incidence cannot be shifted, and it is therefore a direct tax.

I was going on to say that bearing in mind the economic view, and the condition of the English law, we come to the question as to what is the criterion of a direct tax, as defined by this Court.

The Attorney-General has been kind enough to furnish us an abundance of citation in his brief in the Thomas case, and there is there an excellent definition of a direct tax. It is sound and scientific, and, what is more, it satisfies the purposes of this case admirably. I read from the appendix of the defendant in the Thomas case, the colloquy between Mr. Edmunds and Mr. Justice Brown.

"Mr. Justice Brown (addressing Senator Edmunds): Is not the distinction somewhat like this: that direct taxes are paid by the tax-payer both immediately and ultimately; while indirect taxes are paid immediately by the tax-payer and ultimately by somebody else?

"Mr. Edmunds: Yes, sir; that is a much clearer definition than I have given, though I think the whole burden rarely falls on the last man. It is, I think, borne partly by each agent in the movement."

That was exactly the notion that the framers of the Constitution had in their minds at the time.

Some economists may have said that this thing was a direct tax, and others that the same thing was an indirect tax. But there never was the slightest difference between the economists as to the fundamental principle

that a tax which could not be shifted from the person who originally paid it to the purchaser was a direct tax.

I am not defending the economists, but I say that their criterion was a perfectly clear one. The difficulty was in its application, just as much so as the so-called law of torts in the State Courts is hopelessly confused; yet the law is perfectly plain and could be codified in half a dozen pages, but its application and its misapplication to particular cases takes volumes of reports to state.

It is somewhat the same story with the economists. As Mr. Justice Brown says, the distinction is perfectly clear. The difficulty is to find which particular tax answers to the general principle. That principle is the touchstone.

JUSTICE BREWER: Before you finish your argument, I wish you would indicate what you think a man must do to make a voluntary purchase of a stamp tax, or payment of a stamp tax. I do not wish to interrupt you at this moment, but would like to have your statement on that before you finish.

MR. COUDERT: I will take that up now, if your Honor pleases. I am not bound to any particular order of argument.

JUSTICE BREWER: I would like to know what he must do to make a voluntary payment of a stamp tax. You say that this was not a voluntary payment in this case, and I would like to have you state what you would consider a voluntary payment.

MR. COUDERT: The internal revenue statute provides that he shall appeal to the collector, or, rather, to the Commissioner of Internal Revenue, for a refund; and possibly if he did not appeal to the Commissioner of Internal Revenue within two years, as the statute prescribes, the Government might say that he has lost his right by the Statute of Limitations, the lapse of time indicating his willingness to pay. As far as the making of a voluntary payment is concerned I cannot imagine his doing so, unless he filed with the proper

officer of the United States a statement that he was not paying the tax under compulsion of law, but that he was anxious to donate the amount to the Government as a charity.

JUSTICE HARLAN: Who is the proper officer?

MR. COUDERT: The Commissioner of Internal Revenue. These taxes are sold at every drug-store, and the purchaser of the stamp——

JUSTICE HARLAN: Then, if a man lived in Denver, he must send a letter to the Commissioner of Internal Revenue?

MR. COUDERT: If your Honor please, I do not say that he must; I say that he has, in this case, and as far as that is concerned, the question of compliance with the Internal Revenue law is not in the case.

I think myself that if he made the payment and did not appeal to anybody, it would still be money that was taken from him by force of an unconstitutional law, and he could get it back by suit without preliminary formality.

JUSTICE HARLAN: Suppose he bought the stamp, and had no piece of property to put it upon, or no deed of conveyance?

MR. COUDERT: The stamps had a value. Now, whether he used them before he had the intention or not, he was using up valuable property, expending his money, and expending it under compulsion of the law.

JUSTICE BREWER: And you say that the man could recover the taxes, on the ground that the statute is illegal?

MR. COUDERT: Yes, sir, and that a voluntary payment must be indicated by facts showing a lack of compulsion, as this Court has held. I did not go into that fully, because it seemed quite obvious that this case was quite different from Customs cases; for instance, take the case of a man coming into the Custom House, coming into personal contact with the officers of the law, who virtually say to him: "If you do not do so and so, we will detain you;" if he simply indicates dis-

pleasure, in writing or orally, that is a sufficient protest to negative any supposed intention to donate the amount of the tax to the Government. Here the statute says simply that if you do not pay the tax you cannot transfer the property; you cannot sell the property; it may become of no value to you. If you do sell, you become a criminal.

JUSTICE BREWER: The law does not say that he cannot sell.

MR. COUDERT: But looking at it as a fact, he cannot sell it, because no purchaser would take it and no title company would pass the title.

JUSTICE BREWER: Is the Government responsible for what the title company sees fit to demand?

MR. COUDERT: The Government is responsible for putting a man under the necessity of paying the tax or losing the value of his property. All inference of voluntary payment is thus negatived. It seems to me that it sums itself up in this way: The law said: "If you make a transfer without paying that tax, you go to jail." Is a man bound to go to jail as a protest against a law of this kind? As you said in the Swift case, he is not even bound to interrupt his business in order to prove unwillingness to pay. The law says that if he does not do a certain thing he will be criminally punished, and he need not interrupt his business, need not make his property valueless, by holding it and not transferring it. He can transfer it and sue the Government to get the tax back. There is such a thing as compulsion of law. He has the whole United States Government and its machinery against him, and it is quite conceivable that he would not wish to subject himself to an indictment in order to prove that he was not making a voluntary payment. It is only an evidentiary matter, as to whether it was voluntary or not. There is not any technical rule of law which can force us to construe this as voluntary. Cases are looked upon on their own merits. If a man comes through the Custom House and does not make any protest whatever the col-

lector is justified in paying the money over to the Government. He came in contact with the collector, and did not evidence to that officer that he objected to the payment. But, what could a man do here, more than ask for the money back after he had paid it?

The internal revenue law says: "All claims for the refunding of any particular tax alleged to have been erroneously or illegally assessed or collected, must be presented to the Commissioner of Internal Revenue within two years after the cause of action accrued."

I do not know whether that statute applies or not. Out of an abundance of caution, we have brought ourselves within it by complying with it, and have asked the Commissioner of Internal Revenue for a refund, and he has, of course, refused it.

I say that it would be an impossible proposition to say that a man was forced to go to jail, or otherwise be assumed to have been actuated by a desire to donate the money to the Government. The Court is not dealing with fictions. And the statement I have made is in accordance with the doctrine laid down in the Swift case.

I do not know whether I have answered your Honor's question fully. I have done so as fully as I now can. I shall possibly file a supplemental memorandum citing the two or three cases covering the subject.

The law says that any person or persons who shall make a transfer, &c., without having the instrument of transfer duly stamped, "with intent to evade the provisions of this Act, shall be deemed guilty of misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding fifty dollars, or by imprisonment, not exceeding six months, or both, in the discretion of the Court, and such instrument, document or paper not being stamped according to law, shall be deemed invalid and of no effect." The law strikes at the validity of his conveyance, and imposes a fine or sends him to jail, or both.

It seems hardly reasonable to suppose that a man must

risk six months in jail, besides a fine, in order to indicate as a matter of evidence satisfactory to the Court and the government, that he is paying the tax under stress or compulsion.

This clause of the law seems to me to have considerable coercing activity on its face.

When I took up the question of voluntary payment I was speaking of the criterion by which we were to judge of what taxes were indirect and what taxes were direct. I read Mr. Justice Brown's definition, which seemed to me to cover the case quite adequately, and I would also like to refer to the criterion laid down by this Court, which has now passed into the jurisprudence of the Court and fixes the law, I mean that indicated in the Income Tax cases. I will read from the book: "The first question to be considered"—I read from the opinion of the Court—"is whether a tax on the rents or income of real estate is a direct tax within the meaning of the Constitution." That is the question here, precisely. "Ordinarily all taxes paid primarily by persons *who can shift the burden upon some one else, or who are under no legal compulsion to pay them,* are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real of personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes."

That is the criterion laid down by the Court. I am not speaking now of Adam Smith, however dignified he may be, or of John Stuart Mill, or any political economist, but of the opinion of this Court, laying down the criterion by which we wish to have this case adjudged. It adopts the definition which was in the minds of public men in England and the U. S. at the time of the adoption of the Constitution. In other words, it grafts on the law an economic classification—that classification thus legally consecrated becomes fixed, immutable.

The next paragraph of the opinion reads:

"Nevertheless, it may be admitted that although this definition of direct taxes is *prima facie* correct, and to

be applied in the consideration of the question before us, yet that the Constitution may bear a different meaning, and that such different meaning must be recognized. But in arriving at any conclusion upon this point, we are at liberty to refer to the historical circumstances," and so forth.

We have now gone thus far, that the criterion to be looked at is that laid down here by the Court, unless there is something in the law that overthrows that definition, and makes the classification between direct and indirect taxes purely arbitrary, then that definition, and that suggested by Mr. Justice Brown, must apply to the case at bar.

Let us see whether the Court has, since deciding the Income tax cases, established any arbitrary rule which bars us out, and holds this particular tax to be indirect.

There are three cases, and three only, it seems to me, that have any pertinency here. If there are any others, they are mentioned in these cases. I will take them up *seriatim* and see whether there is anything there overthrowing the doctrine of the income tax cases.

They are, first, Nicol *v.* Ames. The Court is so familiar with its own jurisprudence, that I do not care to go into these cases in detail, but merely to state the exact decided point, which was in that case that a tax upon the privilege of sale at an exchange was not a tax upon the sales themselves, but was a tax upon the privilege of sale, and properly considered as an excise or indirect tax.

JUSTICE PECKHAM: Suppose the tax is not on the property, but on the sales thereof?

MR. COUDERT: Then these cases do not apply. Your Honor has most clearly indicated the distinction between the two classes of cases. You considered Brown *v.* Maryland inapplicable because the tax was not on property, but on a privilege which might or might not be availed of.

In the language of the Court a tax upon the privilege of selling property at the exchange dif-

fers radically from a tax upon every sale made in any place, of course. That is a peculiar kind of tax, on a particular privilege, not necessarily and inherently upon property, which is guaranteed to every man by the Constitution, and the tax upon that privilege is a perfectly proper tax in the nature of a license tax.

That is the differentiation which seems to us to differentiate this case now at the bar from these other cases, and to indicate the true distinction: "Direct taxes, in a general and large sense, may be described as taxes derived immediately from the person, from real or personal property, without any recourse therefrom to other sources for reimbursement." Income tax cases.

Then comes the Fairbank case. The other side have misinterpreted our position as to that case, and all of those cases dealing with the export clause of the Constitution.

We do not say that because a tax of some kind has been held to fall upon an export that such decision necessarily determined that the tax was a tax on the thing itself, and therefore a direct tax. Not at all. All we contend is that the doctrine of those cases is that if the tax is imposed upon an exporter, or upon a bill of lading necessary for the export of the goods, that the Court would not look at any fiction, but would go right to the facts and say, That is a tax upon the power to export. We use those cases as showing that what this Court will do is to look into the real, intrinsic, inherent nature of the law and its operation, and will determine whether the tax is really falling on the thing exported, or whether it is really a direct tax falling directly upon property, or whether it is an excise tax, or a true stamp tax, one of the many taxes that have been held to be indirect taxes, and which are really in their nature indirect taxes.

Therefore we cite those cases for that simple purpose, and we cite Nicol *v.* Ames case as differentiating between the tax upon the privilege of selling at a particular place from a tax upon every sale wherever made. The latter is our case.

There is one other case that perhaps I should not omit

to mention, because it is mentioned, and I think relied upon, by the other side. It is Knowlton *v.* Moore.

The rule that is there laid down, as I understand it, is, that an inheritance tax, viz., a tax on property in process of transmission from the dead hand to the living, is not a direct tax; that it does not strike the property; that it strikes the act of transmission, which is a privilege accorded by the law.

The theory of that tax is based upon the doctrine, or rather the practice of the French administrators and the French administration, and it cites the French tax regulations. The French rule is that a tax is a direct tax which is imposed upon property, and the ownership of property, but a tax which is imposed upon some transfer or some act, a legal act or otherwise, is classed as an indirect tax.

There is nothing in the French law that makes the classification. It is simply the French administrative practice, and while it may be perfectly proper to apply the French administrative practice, which economists—the great French economist Leroy Beaulieu, and Mr. Hadley, of Yale, and others—contend is a mere practice that is absolutely unsound, as far as any difference between direct taxes and indirect taxes is concerned,—it does not apply to alienability of property, and for this reason that alienation *inter vivos* belongs to the natural or fundamental law, which is that which is protected by the Constitution. The heritability of property, its transmission by testament, is not a necessary part of property. As I understand it, and as it was held in Magoun v. Illinois Trust Company, 170 U. S., the State could take away the right to transmit property by will, and say that the property should escheat to the State; that property terminated at death, and never passed to those to whom the testator desired to have it go.

Justice McKenna: That was the contention made in that case, but this Court did not pass upon it.

Mr. Coudert: I thought it laid down that doctrine. I may be mistaken, of course.

JUSTICE MCKENNA: My recollection is that the Court passed that proposition.

MR. COUDERT: They passed on the question as to the tax on the inheritance, and it was claimed that there was a right in the State to regulate inheritances. The doctrine of the case, as I remember it, was that heritability and testacy were privileges accorded by the law, and that those privileges were not necessarily and inherently property; that the State could tax them to any extent it saw fit.

JUSTICE WHITE: Why may not this tax be sustained on the theory that it is a tax not upon the property itself, but upon its transmission from one to another?

MR. COUDERT: I am glad your Honor mentioned that point, because I would like very much to make it clear, if I am able to do so. I have given that distinction some thought. That is the doctrine laid down in the case of Knowlton *v.* Moore. I have no quarrel with that doctrine, as far as it relates to intestate or testate succession, because I claim that property after death—the transmission of it—is a mere privilege accorded by the State, and I claim that if a State should destroy the right of heritability, or of testacy, that such a law would not be a taking of property, within the Constitution; that when the Constitution consecrated property, and fixed its meaning by protecting it, it meant property, its possession, income, and alienability *inter vivos;* and such was the American conception of property protected by the Constitution; when you strike that by a tax, then that is a direct tax, and you cannot possibly get away from it by saying it is on transmission.

In the inheritance cases, on the other hand, the inheritance is a privilege not protected by the Constitution; which each particular State accords to its citizens, and if that were taken away, it would not be a deprivation of property; and therefore it is properly a tax upon a privilege.

JUSTICE BROWN: Conceding the accuracy of the definition given by Senator Edmunds in the income tax case, in reply to my question, might not this be con-

sidered a tax upon the grantee, as well as the grantor? And it is very possible that the grantor may have fixed the price of the article—whether it be real estate or personal property—having the stamp taxes in view.

MR. COUDERT: If your Honor please, I was fearful of that when I first took up the case, but I found much comfort from an examination of the authorities. I went to Adam Smith, and found that he considered a tax on conveyances clearly fell upon the seller of the property. I found that John Stuart Mill, the classic political economist, took the same view, as did practically all the economists, both those in existence and cited as authorities at the time of the formation of the Constitution, and those subsequent to that date. I am glad you indicated the point. I might have forgotten to mention it. I have given full citation on it in the brief.

The economists seem to be a unit upon that, so that it is economically true that the tax cannot be shifted, that it is just as direct a tax, as was the income tax, or the tax on land as such.

The tax on the inheritance of property is a different thing. As I understand the doctrine of the Perkins case (U. S. *v.* Perkins, 163 U. S.), if a man dies and there is an inheritance tax, what does his heir get? His heir gets—not the property called C, we will say—the property he dies seized of—but he gets another thing; he gets "A," which is the property C minus the tax. The tax is deducted as a condition of his receiving that property under the laws of the State. He receives the property minus the tax, and on the death of the individual the amount of the tax goes by law direct to the State.

That is entirely different from a transfer *inter vivos*. The disposition after death is a privilege which the law accords to a man upon the condition of his paying so much; it might be fifty per cent. of the inheritance, which is taken away by the State.

In this view, it was said in the case of the United States *v.* Perkins: "The so-called inheritance tax of

the State of New York is in reality a limitation on the power of the testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use."

In other words, that the right to dispose of his privilege by will shall remain, but subject to the condition that the State has the right to impose a tax upon its transmission. "Certainly it would be true that the right of testamentary disposition is purely statutory" and by purely statutory is meant that it is not protected by the Constitution, not an integral and necessary portion of property—"and the State has the right to require a contribution to the public treasury before the bequest shall take effect."

That is the idea I was trying to express in less adequate and correct language than is used in the quotation.

For that reason, I say that the tax imposed in the case of Knowlton *v.* Moore was a tax on the privilege of transmission. It was a tax upon property, which is in the air, between a dead man and a living man, before the law confers it upon the living; and it is taken out, excised out, and is thus a tax on the privilege.

JUSTICE WHITE: It was defined to be a tax on the act of transmission, not on the privilege or something in the air, but on the act. You say that is the case in France?

MR. COUDERT: Yes, sir; that is the French administrative practice.

JUSTICE WHITE: It was likewise so in Germany, a tax on the act of transmission. Now, this tax is on the act of sale, is it not?

MR. COUDERT: But that act of sale, if your Honor please, is an integral property right, and the act of transmitting the property from a deceased person to his heir is not, but it is a privilge, and made the subject of a tax, like an occupation tax, for instance. A man can be taxed because he is a lawyer, indirectly, but he cannot

be taxed indirectly because he is a man, because that is a capitation tax and must be apportioned. A man does a certain thing, and if the law attaches no importance to it, it is not a legal act at all. But the law does attach a certain importance to the making of a will, and what is that law? That is the statutory law. It is a privilege. It is not a part of the property. It is not one of those acts which is a necessary and integral part of property, protected by the Constitution of the United States.

That is the distinction, and it seems to me that it is a clear distinction, and that is why it may be perfectly proper to advert in the Knowlton case to the administrative definitions in France. Those definitions, I think, are based on the fact that the assessment rolls, when they make them up in France, include all the taxes on land, and taxes that they cannot put on the rolls at the beginning of the year they consider indirect taxes, simply because they cannot make up their assessment rolls in advance. That is all. It is purely a matter of administrative usages, and does not conflict in any way with what the Court has said in the income tax cases, and which is now the final criterion.

In Magoun *v.* Illinois, to which Mr. Justice McKenna referred, it is stated: "An inheritance tax is not one on property, but one on succession."

JUSTICE MCKENNA: I understood you to say that it was decided in that case that the State could take it away absolutely.

MR. COUDERT: Well, as I understand it, that is the inference from that decision. That is the doctrine.

JUSTICE MCKENNA: No; as I remember the case, I expressly excluded that idea in the opinion.

MR. COUDERT: Your Honor is more familiar with it than I am, of course. I may have misstated it. I will read the extract upon which I base my statement.

JUSTICE MCKENNA: You probably may have misunderstood it.

JUSTICE WHITE: The Court said in that case, referring to that proposition:

> "The second principle"—that is the very principle to which you refer—"was given prominence in the arguments at bar. The appellee claimed that the power of the State could be exerted to the extent of making the State the heir to everybody, and the appellant asserted the natural right of children to inherit. Of the former proposition we are not required to express an opinion."
>
> "On the contrary, the Court directly declined to express an opinion, but said, however, it may be the subject of regulation. The State has the power to regulate it, but the Court expressly refrained from deciding whether that power of legislation would extend further."

MR. COUDERT: Possibly I stated it too broadly; but I will read the three lines on which I based my assumption. "The right to take property by devise or descent is a creature of the law, and not a natural right, a privilege, and therefore the authority which confers it may impose conditions upon it."

I hardly think we would say the right to possession of a man's property was a privilege, under the Constitution, and it seems to me that while I may have stated the actual decision broadly, the doctrine laid down in those three or four sentences, and in line with the case of Perkins *v.* The United States, Fox *v.* The United States and the other cases, makes that quite clear.

In any event, I argue that the distinction between Knowlton *v.* Moore and our case is, that this is on one of the fundaments of property, and according to the general doctrines and jurisprudence enunciated very clearly by this Court, there is a radical distinction between transmission of property as a legal incident to death and transmission of property *inter vivos.*

We have, therefore, reached this point:

That on principle, considered logically and economically, the tax is one upon property.

Second, that under the doctrine of the income tax cases, the question of the ultimate incidence of the tax was very largely determinating, unless there was something in the positive law the other way.

Third, we have seen that neither in English law nor in American law has there ever been *any construction* of this tax which would be binding or which would in any way affect the judgment of this Court against holding it to be a direct tax.

The income tax cases, therefore, lay down the principle for which we contend.

I am aware of the dissent in the income tax cases, and I would like to take up for a moment the "grammar of dissent," as well as the "grammar of assent." I think the grammar of dissent is also in our favor. That system was predicated, as I understand it, upon this: that the views of economists as to shifting incidence were matters that could not be taken into consideration; that it was not a primary question at all; that the question had been settled by long statutory construction and by the decisions and dicta of this Court: that the only direct taxes were land taxes and capitation taxes.

I have no serious quarrel with the doctrine laid down in the minority opinion in those cases, because I contend that this is a land tax; that this tax falls upon the owner of every particle of land. If he sells the land, he has to pay it, and the incidence cannot be shifted from him. If he does not sell it, nevertheless, it is a tax on the alienability of the property, and makes it less valuable. If the law said that every conveyance of property valued at more than fifteen or twenty thousand dollars, should pay two or three thousand dollars tax, it would make property much less valuable, and would be felt by all property owners. Therefore, even under the narrower theory that direct taxes are only capitation taxes and taxes on land, I claim that this is a direct tax upon property, and cannot be distinguished from it.

That land taxes are direct all the members of this Court have agreed. That question can never be reconsidered. It is finally adjudicated. This tax is one on land and even had no other argument existed that would be final. We desire to press this view with much earnestness as it seems a short, complete and logical determination of the question.

My friend on the other side, seems to me to concede the basis of our argument, when he says:

> "A tax upon the sale of lands is a tax upon only one of the many rights and incidents peculiar to and necessarily connected with the ownership of real property, while a tax upon the land on account of one's general ownership thereof is manifestly a tax upon each and all of the many rights and incidents appertaining to the ownership of real property. The former tax can not be the legal equivalent of the latter tax for the reason that a part can never equal the whole."

But if we apply the same reasoning to an income tax, the conclusion is the same.

> "A tax levied upon the income from lands is necessarily a tax upon each and all of the many rights and incidents appertaining to the ownership of the lands, and, as was said by Mr. Justice White, 'is the legal equivalent to a tax upon the lands.' It follows, therefore, that such a tax is not the legal equivalent of a tax levied upon only one of the many rights and incidents necessarily connected with the ownership of the lands."

It seems to me that that is absolutely unsound. Suppose I owned a house, and am offered five thousand dollars rent for it, but do not choose to accept that while the income tax is in force. I am not taxed one dollar. Why? Because I have not rented my house. I am living in it and getting the benefit of it. So that the in-

come tax is not, any more than this tax is, a general tax on all property, or the possession of it, but only on that from which you, derive rent, as in the illustration just given. If I rent my house, and get the income from it, I am taxed, otherwise not.

In the same way the argument is applicable to this case. I own my house. I do not sell it. Very good; I do not have to pay the tax, although the property may be affected by the tax. But if I sell it,—just as though I should receive the income from it under the illustration just given as to the income tax,—then I must pay a tax. So that the income tax decision and this tax upon the conveyance of real estate are so intertwined and intermarried that I say it is absolutely, logically impossible to disentangle them. An arbitrary distinction may be made, and it may be said that a tax upon the act of sale of property, regardless of anything else, is an indirect tax. In that event, we would have to bow to the majesty of the law, but in reason this tax cannot be differentiated from the tax on incomes, the right to which is one of the incidents of property. Income may or may not exist. Many of us do not get any income from our property, but rather derive losses, and the income tax would not affect us. Therefore, it is unsound to say that such a tax is a tax upon all property, by reason of the ownership alone, whereas this tax is only a tax upon one of the rights necessarily connected with property.

David Wells, the economist, said that before the enactment of the Civil War tax statute, there have never been in the history of the world, since the days of scholasticism, so many absurd and subtle distinctions made; that since the time when the question was discussed by learned doctors as to how many angels could stand on the point of a needle, until the time of the distinctions made in the various internal revenue acts between various kinds of taxes, and how they should be paid, there never has been so much unprofitable discussion.

It seems to me that the Court has put an end to much of that in the Fairbank case by saying: We are going

to study these things, we are going to discard all fictions and find out exactly what and where the tax strikes.

The excise taxes have almost from time immemorial, certainly from the seventeenth, if not from the sixteenth century, in Holland and England been considered as indirect taxes by the law-makers and economists and everybody, because it has been said that it was the consumer that paid, and hence they were taxes on consumption.

I am perfectly willing to admit that the Hylton case was properly decided, when it was said that a tax on carriages let out by a carriage owner was perfectly proper, that it was on his occupation, so that the tax was recouped by reason of his charging more for his carriages; that it was not in conflict in any way with the income tax case, because not only the economists but English thought generally, for a great many years, had always considered those taxes as falling on the consumer, and as consumption or expense taxes.

Therefore we cannot assume that there was any doubt in the minds of the framers of the Constitution that the general class of excise taxes were indirect taxes. They knew the excise taxes were indirect taxes, and therefore when they appeared in the Constitution and when they were enforced, people did not challenge their constitutionality, because it was clear as to what the Constitution meant when as to them.

That reasoning, however, is not applicable to this particular and peculiar tax on real estate conveyances: as we have shown, it only came in very late in the development of English law; we have only seen it once in the development of our own law, and all our precedents are to the effect that this is a direct tax either because it is a land tax or because, like an income tax, it falls on the land, or on both grounds.

Therefore, logically, economically and legally, it is a direct tax. There is nothing in the law which militates against that view, and, as I conceive, there is absolutely nothing in our decisions which holds that a tax of this kind can be assimilated, for instance, to a tax on sugar, or spirits, or on occupation.

In closing, I can only say that in its nature, in its inherent nature, the tax is directly and really upon property. It cannot be even plausibly argued that it is upon anything else; there is nothing in the genesis and historical development of our tax system to show that it can be considered by anybody as otherwise than a tax upon real estate; and that, further, the income tax cases, by their definitions of direct taxes and the case of Nicol *v.* Ames by its differentiation between sales in an exchange and sales everywhere, and the case of Fairbank *v.* The United States, by its doctrine that the real nature of the tax would be looked into, cannot be reconciled with any other theory than the theory on which we proceed, that this is a direct tax, and, not having been apportioned, is therefore unconstitutional.

WASHINGTON, D. C., Friday, December 4, 1903,
12 o'clock M.

The hearing of this cause was resumed at the above date and hour, the Chief Justice and all the Associate Justices being in attendance.

Present on behalf of the plaintiff in error, MR. COUDERT and Mr. FULLER.
Present on behalf of the United States, Mr. PURDY.

Argument of Paul Fuller, Esq., on behalf of the Plaintiff in Error.

MR. FULLER: With the permission of the Court, I will trespass a very few moments in making a brief reply to the Honorable Assistant Attorney-General.

It is incumbent upon me first to take up the question of voluntary payment. It will be sufficient to say that my friend on the other side has mistaken the purport of the several decisions, which he quotes to the Court, beginning with the Elliott *v.* Swartwout case. As the Court will remember, all those cases were cases against collectors and the pre-requisites to a cause of action were aimed to protect the collector, the agent of the United States, who had paid over to the United States the money collected, and who could not be held responsible unless he had been apprised of a protest. So much for those cases.

Turning now to the statutes which the Honorable Assistant Attorney-General has quoted in his brief, I think that your Honors will find them simple, coherent and perfectly satisfactory to sustain the jurisdiction of this Court, without entering any further protest than that which we have made.

Section 31 of the law, which is quoted at page 13 of the Attorney-General's brief, says: "That the Commissioner of Internal Revenue, subject to the regulations of the secretary of the treasury, shall be, and hereby is, authorized to remit, refund and pay back all duties

erroneously or illegally assessed or collected, and all judgments or sums of money recovered in any court against any collector or deputy collector for any duties or licenses paid under protest."

That is an administrative authority and discretion given to the commissioner to act individually and return the funds without any appeal to this Court or to any Court. Moreover, that is the law of 1862 long since replaced by a statute in which no mention is made of a "protest."

If we turn to page 15 of the Attorney-General's brief, we find Section 3226 of the law, which contains this language:

"No suit shall be maintained in any Court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected * * * until appeal shall have been duly made to the Commissioner of Internal Revenue, etc."—not, as my friend supposed and stated, until "*an* appeal has been *taken.*" That is a technical nomenclature of the courts; but the expression of the act is "until appeal shall have been duly made." In other words, until an objection to the payment in the form of an appeal or an application to the Commissioner of Internal Revenue shall have been made. That is the protest provided by this law, and that is the protest which has been made in this case.

This is made still plainer by Section 3228, cited at page 16 of my opponent's brief,—and it is a great privilege to have an arsenal provided by the other side from which to draw ammunition. Section 3228 reads: "All *claims* for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected * * * must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued." That specifies the officer to whom the protest or "claim" can be made.

JUSTICE BROWN: Was there not in this case an application made for a refund?

MR. FULLER: Yes, sir; and it was denied. That was alleged in the petition. We could not make the protest to any post-office clerk who sold stamps, nor even

to the collector who did so, because there is no provision for submitting a protest to the collector. The application, or the appeal, or the claim,—in other words, the protest, the evidence that the payment was not voluntary,—must be made to the Commissioner.

JUSTICE PECKHAM: It does not appear how these stamps were procured, or where?

MR. FULLER: No, sir, except that they were procured from the collector.

JUSTICE HARLAN: Where? When?

MR. FULLER: In New York, within the two years.

JUSTICE HARLAN: Some while before the application for permission to refund?

MR. FULLER: Yes, sir.

JUSTICE HARLAN: More than a year?

MR. PURDY: Eighteen months.

MR. FULLER: I take the word of the Assistant Attorney-General on that point. I really do not remember, but I know it was within the statutory time required by the law, that we made application for a refund.

JUSTICE BROWN: Were these stamps procured for use on any particular instrument, or were they procured generally?

MR. FULLER: I do not believe the petition shows that, but Mr. Coudert informs me he believes that they were procured generally.

JUSTICE DAY: Is there any discretion in the Commissioner to refund if he saw fit?

MR. FULLER: He can if there has been an application of some kind; but in order to have recourse to the courts, no suit shall be brought until application has been made; that is, "until appeal has been made to the Commissioner for a refund"—not an appeal *from* anything.

JUSTICE DAY: I understand.

MR. FULLER: With that, I will leave that question to the discretion of the Court and proceed to answer certain of the objections made by the learned Assistant Attorney-General.

The task of discussion has been facilitated by the presentation in the brief of the Attorney-General.

At pages 41 to 44 of the brief we find this statement: That this is not to be assimilated to the income tax, because the income tax touches and reaches *all the rights and elements that go to make up property;* and that when a man is compelled to pay a tax upon an income of his property, he pays a tax bearing upon all the elements—possession, alienability, enjoyment; while a tax upon the conveyance of the property touches only one of those rights or elements, and therefore they are not to be assimilated.

Even if that statement were correct, it would be sufficient to show its own inefficacy, for I am quite as much deprived of my property by having one of its material and essential elements interfered with as if they were all interfered with. It is not necessary to murder a man that you should eviscerate him. It is sufficient if you touch his heart. And that is precisely the situation here.

But the illustration is erroneous,—totally misconceived. The income tax does not touch all the elements or rights in property. It touches only one,—the right of enjoyment; in other words, the right of getting money out of it; the right of revenue or rental. It does not touch the property that a man does not lease. It does not touch the property that a man does not receive any cash from. It does not touch his right of possession. He can remain in his palace on Fifth Avenue, without any rent, and pay nothing by way of income tax out of the annual value of that property. Therefore it does not touch his right of possession. He can sell that property, and pay no income tax on the proceeds. So that it does not touch the right of alienation. It touches one of the three essential elements necessarily connected with the ownership of property. And that term: "necessarily connected with the ownership of property" I borrow again from my friend (p. 33, Gov't. Brief). With the candor characteristic of the Department of Justice, he does not deny that the power of alienation is necessarily connected with the right of ownership of the property.

That is the only difference between those cases of the tax on income, and the tax on alienation.

Whether the tax touches my right to sell, whether it touches my right to rent, it is absolutely and identically the same interference with property.

Another view of that: It has been said that a tax that is upon an act of transmission, or upon an occasional act, voluntarily undertaken by the owner, is not a tax upon the property. Let us take that statement and examine it. What is a tax on the income of realty? Is it not, in reality and substance (and it is reality and substance that the court is looking for) a tax upon his lease? If he does not lease the property, the income tax does not fall upon it, but when he does lease the property and collects the rental, then that becomes a part of the income, and he would have to give it up; such a tax was considered a direct tax upon property, which had to be apportioned. Now in relation to conveyances. When a man chooses to make a conveyance, and collects the purchase price, this tax excises a part of the purchase price and takes it away from him and keeps it. Is there any difference? There may be, but none within my comprehension.

Therefore there is an absolute similarity to the income tax cases. If they are to be sustained, if Knowlton *v.* Moore* has not undermined them,—whether it

Knowlton v. *Moore* sustains a tax upon the transmission of an inheritance. That the transmission of property after death is a mere privilege granted by the State as distinguished from a right of property which can only be disturbed by due process of law, is abundantly shown by the cases already cited of *U. S.* v. *Perkins*, 163 U. S., 625; *Magoun* v. *Illinois Trust Co.*, 170 U. S., 283, and the cases there commented on, but, the attention of the court is called to the case of *U. S.* v. *Fox*, 94 U. S., 315, in which a devise to the United States was declared void under the law of New York, which only permitted devises to corporations expressly authorized to take by devise.
The Court says (p. 231):

> "The power of the State to regulate the tenure of real "property within her limits, and *the modes* of its acquisition and transfer, and the *rules of its* descent, *and the "extent to which a testamentary disposition of it may be "exercised* by its owners is undoubted * * * Every "person must therefore, devise his lands in that State "within the limitations of the Statute *or he cannot devise "them at all. His power is bounded by conditions.*"

was the purpose of the opinion to undermine them or not,—I will leave it to the court to say, and I leave it to the court to say whether they consider that it has undermined them—if the income tax decisions are to be sustained, then a tax upon rentals, upon the proceeds of a lease, is a direct tax upon property. And a tax on a sale, or the proceeds of a sale, are equally a direct tax on the property. There is no getting over it. If you take the very reasoning of the Attorney-General, on pages 41 to 47 of his brief, he has reduced it to that. He has tried to differentiate between a tax on one of these elements of property and a tax upon another. With all respect to the acumen of the Department of Justice, they have not so differentiated it.

I cannot see, if your Honors please, that there is anything further to be said in this case. My learned and better equipped associate has gone over the ground very fully, and the only purpose of this reply was to emphasize the admissions made by the Attorney-General. Whether the decision in this case is going to affect the revenues of the country has absolutely nothing to do with it. In the income tax cases, the revenues, as Mr. Reed said, were affected vastly; but the solution of a problem of this character does not depend upon whether Congress will be obliged to resort to other methods of taxation to make up the loss.

As a matter fact the law has been repealed and the amount involved is comparatively small.

I entirely agree with the Assistant Attorney-General that the power of Congress is omnipotent and reaches everywhere, even to a man's grave, for taxation; but the power may only be exercised under certain expressed limitations. It must be done in the way prescribed by the Constitution, and when it is a direct tax, it must be apportioned.

Here let me observe that the term "direct" has no reference to the form or method of taxation. "Apportionment" is a method. But whether a tax is "direct" depends upon the substance and effect of the tax, and,

no matter how tortuous or evasive or deceptive is the method employed to make it appear indirect, if it falls upon the property directly, if it takes something out of that property which cannot be recouped against anybody else, it is direct.

This Constitutional provision was not an invitation to the legislature to try conclusions with Polonius, and endeavor "by indirection to find direction out;" it was a prescription that whatever touched property directly should be apportioned. And I cannot conceive of anything more direct than the taxing of rentals and the taxing of the purchase price of a man's property.

The Government Brief makes an attack upon the Constitutional rule of apportionment, but as stated in the Income Tax Cases (157 U. S.) the rule was imposed, it was accepted, and it must be respected until constitutionally removed.

With that, I leave the case to the Court, having fulfilled my promise to occupy but a few minutes of the Court's valuable time.

Mr. Coudert: If the Honorable Court has no objection, I should like to cite one authority in connection with that portion of my argument of yesterday regarding the practice of the French administration, and in connection with Mr. Justice White's question on that subject.

The Chief Justice: Certainly.

Mr. Coudert: It is simply this: Mr. Justice White, in Knowlton *v.* Moore, largely based his decision upon what was the practice of the French administrators in regard to the official classification of taxes. Mr. Leroy-Beaulieu, who is the greatest authority on finance in France, says this in his book—and I will translate it because I am afraid the Court might not understand my French: "It is remarkable that the French administration of finance classifies license taxes among direct taxes, but on the contrary, license taxes on wine merchants are classed as indirect taxes. One of the strangest anomalies of this kind outside of France is

that of the Italian administration, which classes as direct taxes all taxes upon millers, but as indirect taxes those upon other businesses; and therefore," he goes on to say: "This administrative definition is altogether empirical and illusory. *It confounds things* which ought to be distinct, and it has as a basis for classification only accessory and incidental characteristics, and none of the principal characteristics of the taxes whatever."

It is simply useful in an administrative sense, in making up the assessment rolls.

MR. PURDY: I would like the permission of the Court to file a supplemental brief on the question of protest—just a few pages.

THE CHIEF JUSTICE: Can you file that within a couple of days?

MR. PURDY: Yes, your Honor.

THE CHIEF JUSTICE: Very well; within two days.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

ROBERT A. CHESEBROUGH, PLAINTIFF IN error,
v.
THE UNITED STATES.
} No. 152.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

On the 23d day of May, 1902, Robert A. Chesebrough, the plaintiff in error, filed his petition in the district court of the United States for the southern district of New York, to recover the sum of $600 from the United States, alleged to have been paid to the collector of internal revenue for the second district of New York, for the purchase of certain internal-revenue stamps to be affixed to a deed for the conveyance of certain real estate. (Record, p. 6.)

It appears from the allegation contained in the petition that about eighteen months prior to the commencement of this suit the petitioner had purchased from the collector of internal revenue

for the second district of New York $600 worth of internal-revenue stamps with which to stamp a deed for certain real property which he was about to sell to the Chesebrough Building Company, of the city of New York. The petitioner now seeks by this suit to recover back from the Government this amount of money, upon the ground that the law of Congress requiring a deed for the conveyance of real estate to be stamped with internal-revenue stamps was unconstitutional and void. (Record, pp. 3–6.)

The plaintiff in error alleges in his petition that he was unable to sell the real estate to the proposed purchaser until the deed was properly stamped as required by law, for the reason that the company would not accept the deed unless internal-revenue stamps to the value of $600 were affixed thereto; that because of such requirement on the part of the proposed purchaser, and under compulsion of law, he was compelled to purchase from the collector of internal revenue for the second district of New York internal-revenue stamps of the value of $600, which he thereafter affixed to said deed (Record, p. 4).

It is not alleged that any "protest" was made to the collector of internal revenue at the time of such purchase and payment, or that any "notice" was given or served upon the collector of internal revenue, or any other officer of the United States, to the effect that a suit would be instituted for the recovery of the money so paid; nor is it alleged

that an appeal was thereafter taken to the Commissioner of Internal Revenue. More than eighteen months elapsed after such payment before the United States Government, or any of its officers, were notified that the plaintiff in error intended to present a claim for the refundment of these moneys, at which time, to wit, on the 9th day of January, 1902, an application was made by the plaintiff in error to the Commissioner of Internal Revenue for the refunding of the amount so paid by him for the purchase of stamps eighteen months before. (Record, p. 5.)

So far as appears from the petition, the payment of the moneys now sought to be recovered was entirely voluntary upon the part of the taxpayer, unless the mere existence upon the statute books of what the plaintiff in error now claims to be an unconstitutional law can be regarded as such a compulsion as would relieve the payment so made of its voluntary character.

The first question, therefore, is whether, under the statutes of the United States applicable to the collection and payment of internal revenues, there be such a thing as a voluntary payment of an internal-revenue tax which would prevent a subsequent recovery from the Government, or, in other words, whether in making a payment of an internal-revenue tax "a protest" or "notice of suit" is necessary and essential as a condition precedent to suit against the United States for the recovery of the moneys so paid. (Record, pp. 4 and 5.)

Paragraph 5 of the petition alleges that prior to the institution of this action the petitioner, pursuant to the laws of the United States and the regulations of the Treasury Department in such case made and provided, made a written application to the United States Commissioner of Internal Revenue on the 9th day of January, 1902, for the refunding of the amount so paid for stamps as aforesaid, which application was denied (Record, p. 5).

Then follows an allegation to the effect that the provisions of the war-revenue act of June 13, 1898, requiring a tax to be paid to the United States upon conveyances, are unconstitutional and void, and in violation of certain provisions of the Federal Constitution, for the reason that the tax imposed by such law is a "direct tax" within the meaning of the Constitution (Record, p. 5).

To this petition a demurrer was interposed by the United States attorney for and on behalf of the United States, on the ground that the petition did "not state facts which would constitute a claim on the part of the claimant against the United States." (Record, p. 6.)

On the 12th of June, 1902, the case was brought on for hearing and argument before the Hon. George B. Adams, United States district judge for the southern district of New York, whereupon it was "ordered, adjudged, and decreed that the demurrer to the petition be sustained, and that the petition be dismissed." On the same day a judgment was duly entered and filed with the clerk of

said court sustaining the demurrer and dismissing the petition. (Record, p. 7.)

On July 10, 1902, the claimant filed his petition for a writ of error to the Supreme Court of the United States, which was allowed on the same day by the Hon. George B. Adams, United States district judge, and the case is now here for a review of that judgment. (Record, pp. 1 and 2.)

QUESTIONS OF LAW.

This appeal presents two questions of law for the consideration of this court, one statutory, the other constitutional.

First. Under the Federal statutes relative to the collection and payment of internal revenue, is there such a thing as voluntary payment of an internal-revenue tax which will thereafter preclude the party paying the same from maintaining a suit against the United States for its recovery?

Second. The other question of law presented on this appeal is the constitutionality of the provisions of the act of Congress of June 13, 1898 (30 Stat., 448, 460), known as the war-revenue act, which levied a tax of 50 cents on each deed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to or vested in the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value exceeds $100, and does not exceed $500; and for each additional $500 or fractional part thereof in excess of $500, 50 cents.

The following are the portions of the act of June 13, 1898, known as the war-revenue act, material for the consideration of this case:

Adhesive stamps.

SEC. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule.

SEC. 7. That if any person or persons shall make, sign, or issue, or cause to be made, signed, or issued, any instrument, document, or paper of any kind or desctiption whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof

shall pay a fine of not more than one hundred dollars, at the discretion of the court, and such instrument, document, or paper, as aforesaid, shall not be competent evidence in any court.

Schedule A.—Stamp taxes.

Conveyance: Deed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value exceeds one hundred dollars and does not exceed five hundred dollars, fifty cents; and for each additional five hundred dollars or fractional part thereof in excess of five hundred dollars, fifty cents.

REPEAL.

Section 7 of the act of April 12, 1902, entitled "An act to repeal war-revenue taxation and for other purposes" provides as follows:

SEC. 7. That section four of said act of March second, nineteen hundred and one, and sections six, twelve, eighteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, Schedule A, Schedule B, sections twenty-seven, twenty-eight, and twenty-nine of the act of June thirteenth, eighteen hundred and ninety-eight, and all amendments of said sections and schedules be, and the same are hereby, repealed (32 Stats., p. 96).

WHEN TO TAKE EFFECT.

SEC. 11. That this act, except as otherwise specially provided for in the preceding section, shall take effect July 1, 1902.

I.

The payment of this tax by the plaintiff in error was purely voluntary, and unless the Government has by statute conferred upon the taxpayer the right to sue for the recovery of taxes voluntarily paid, there can be no recovery, and the demurrer was properly sustained.

We will concede, but only for the purpose of the argument, that the tax complained of is illegal and void. It appears from the petition that Mr. Chesebrough purchased from Charles H. Treat, the United States collector of internal revenue for the second district of New York, documentary internal-revenue stamps to the amount of $600, for the purpose of affixing the same to a deed of conveyance. It further appears that neither the collector of internal revenue, nor any officer of the United States, at the time of the purchase was informed of the purpose for which such stamps were to be used, and that no "protest" or "remonstrance," either written or verbal, was made at the time of such purchase, nor until about eighteen months thereafter, when an "application" was made to the Commissioner of Internal Revenue for the refunding of the amount paid. It is the claim, however, of the plaintiff in error that the stamps

were purchased by the petitioner from the collector "under compulsion of law." The precise question, therefore, is;—having a given law upon the statute books which is unconstitutional and void, is it possible to pay the tax imposed by such law in such a manner as to estop the taxpayer from recovering by a subsequent suit against the Government the amount of the tax so paid to the Government.

If the facts in this case do not constitute a voluntary payment by the taxpayer, then there is no such thing under the law as a voluntary payment which will prevent a subsequent recovery.

In the consideration of this proposition we will first discuss what we conceive to have been the law in the United States as it existed prior to the enactment of the statutes which have conferred upon the taxpayer the right to maintain a suit for a recovery of the tax when erroneously or illegally exacted, and which selfsame laws have conferred upon the Commissioner of Internal Revenue the right to make refundment of taxes illegally exacted or erroneously paid in certain cases upon application.

(A)

Prior to the passage of the Federal Statutes, hereafter to be considered, an internal-revenue tax, if paid "voluntarily," without "protest" or "notice of suit," could not be recovered.

Cooley, in his work on the Law of Taxation, third edition, page 1495, has the following to say

with reference to the voluntary payment of taxes:

> That a tax or assessment voluntarily paid can not be recovered back, the authorities generally agree. And it is immaterial in such a case that the tax or assessment has been illegally laid, or even that the law under which it was laid was unconstitutional. The principle is an ancient one in the common law, and is of general application. Every man is supposed to know the law, and if he voluntarily makes a payment, which the law would not compel him to make, he can not afterwards assign his ignorance of the law as a reason why the State should furnish him with legal remedies to recover it back. Especially is this the case when the officer receiving the money, who is chargeable with no more knowledge of the law than the party making the payment, *is not put on his guard by any warning or protest*, and the money is paid over to the use of the public in apparent acquiescence in the justice of the exaction. (See full list of cases cited.)

In the case of *Elliott* v. *Swartwout* (10 Peters, 137, 152) Mr. Justice Thompson, in delivering the opinion of the court, said:

> The case put in the second point is, where the collector has received the money in the ordinary and regular course of his duty, and has paid it over into the Treasury, and no objection made at the time of the payment,

or at any time before the money was paid over to the United States. The manner in which the question is here put presents the case of a *purely voluntary payment, without objection or notice not to pay over the money, or any declaration made to the collector of an intention to prosecute him to recover back the money.* It is, therefore, to be considered as a *voluntary payment*, by mutual mistake of law; *and in such case no action will lie to recover back the money.* The construction of the law is open to both parties, and each presumed to know it. Any instruction from the Treasury Department could not change the law, nor affect the rights of the plaintiff. He was not bound to take and adopt that construction; he was at liberty to judge for himself and act accordingly. These instructions from the Treasury seem to be thrown into the question for the purpose of showing, beyond all doubt, that the collector acted in good faith. To make the collector answerable, after he paid over the money, *without any intimation having been given that the duty was not legally charged, can not be sustained upon any sound principles of policy or law.* There can be no hardship in requiring the party to give *notice* to the collector that he considers the duty claimed illegal and put him on his guard by requiring him not to pay over the money. The collector would then be placed in a situation to claim indemnity from the Government. But if the party is entirely silent, and no

> intimation of an intention to seek a repayment of the money, there can be no ground upon which the collector can retain the money, or call upon the Government to indemnify him against a suit. It is no sufficient answer to this, that the party can not sue the United States. *The case put in the question is one where no suit would lie at all. It is the case of a voluntary payment, under a mistake of law*, and the money paid over into the Treasury; and if any redress is to be had, it must be by *application to the favor of the Government*, and not *on the ground of a legal right.*

In the case of *Erskine* v. *Van Arsdale* (15 Wall., 75, 77), Mr. Chief Justice Chase, in delivering the opinion of the court, said:

> Taxes illegally assessed and paid may always be recovered back, *if the collector understands from the payer that the taxes are regarded as illegal and that suit will be instituted to compel the refunding of them.*

The authorities are overwhelming to the effect that if payment is clearly voluntary, "without compulsion," "protest," or "notice of suit," there can be no recovery unless such right of recovery is expressly or by necessary implication conferred by statute.

(B.)

An examination of the Federal Statutes relative to the collection, payment, and refundment of internal-revenue taxes illegally or erroneously paid for the purpose of ascertaining whether a case of voluntary payment, so far as the right of suit for its recovery is concerned, rests upon common ground with a case of payment under protest or notice of suit.

By the act of Congress approved March 3, 1863, entitled, "An act to amend an act entitled, 'An act to provide internal-revenue to support the Government, and pay the interest on the public debt, approved July 1, 1862,' and for other purposes" (12 Stats., 713, 729), we find the following provision:

> SEC. 31. *And be it further enacted*, That the Commissioner of Internal Revenue, subject to the regulations of the Secretary of the Treasury, shall be, and hereby is, authorized to remit, refund, and pay back all duties erroneously or illegally assessed or collected, and all judgments or sums of money recovered in any court against any collector or deputy collector for any duties or licenses *paid under protest*.

In the case of *City of Philadelphia* v. *Collector* (5 Wall., 720), Mr. Justice Clifford, in delivering the opinion of the court, in referring to the above provision of the act of 1863, said (p. 730):

> Collections were required by the twenty-third section of the act (the act of which

the above is an amendment, 12 Stats., 434) to be completed within six months, and collectors were required to render their final account and pay the sums collected into the Treasury within that period. Argument is that inasmuch as collectors were required by that act to pay all moneys collected into the Treasury, they can not be held liable to refund any portion of such collections; but the same requirement is made of the commissioner, and yet he is authorized to remit, refund, and pay back all duties erroneously or illegally assessed or collected, and to pay all judgments or sums of money recovered in any court against any collector or deputy collector for any duties or licenses *paid under protest*.

This being the law with reference to the voluntary payment of taxes, the question arises as to whether the enactment of the law of 1866, contained in section 3226, Revised Statutes, operated as a waiver, so far as the Government is concerned, of its right to require that the tax be paid under "protest" as a preliminary prerequisite to appeal to the Commissioner of Internal Revenue under that section, for the purpose of laying the foundation for a suit against the United States in case the decision of the Commissioner was adverse to the appellant. If such be the law, it must be found from some implication contained in sections 3220, 3226, 3227, and 3228, Revised Statutes. There is no express provision of law by which the United States has ever consented to be sued for the recov-

ery of a tax which has been voluntarily paid. The whole theory of the law giving the taxpayer the right to a suit is predicated upon the assumption that the tax was paid involuntarily and under compulsion. Keeping in mind, therefore, that at the time of the passage of this law the taxpayer could not maintain a suit against the United States or against the collector for a tax which he paid "voluntarily," and without "protest" and under "no compulsion," except the mere fact that there existed an unconstitutional law, as he claimed, which required him to pay the tax, let us examine the various acts for the purpose of determining whether expressly or by necessary implication the preliminary prerequisite of a protest was abrogated. The law says:

> SEC. 3226. No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected * * * until appeal shall have been duly made to the Commissioner of Internal Revenue, etc.

Does not this language clearly presuppose an adverse decision by the collector? The language is "until an appeal shall have been duly made," and it seems to me that the word "appeal" is used in its ordinary legal signification. It does not say until an "application" has been made to the collector of internal revenue for the refundment of the tax, but until an "appeal" has been made, which must, as I take it, show a clear intention on

the part of Congress to require that the tax be paid under protest or compulsion, as was the law of the land at the time this right was conferred by statute upon the taxpayer.

> Section 3227 provides that no suit for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected * * * shall be maintained in any court, unless the same is brought within two years after the cause of action accrued. * * *

Section 3228 is entitled "Claims for refundment, limitation," and provides as follows:

> All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected * * * must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued.

Section 3226 was originally section 19 of the act of July 13, 1866 (14 Stat., 97, 152), and was as follows:

> SEC. 19. *And be it further enacted*, That no suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected until appeal shall have been duly made to the Commissioner of Internal Revenue according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of said Commissioner shall be had thereon, unless such

suit shall be brought within six months from the time of said decision or within six months from the time this act takes effect: *Provided*, That if said decision shall be delayed more than six months from the date of such appeal then said suit may be brought at any time within twelve months from the date of such appeal.

Sections 3227 and 3228 are evidently taken from section 44 of the act of Congress passed June 5, 1872 (17 Stat., 229, 257). Section 44 of that act is as follows:

SEC. 44. That all suits and proceedings for the recovery of any internal tax alleged to have been erroneously assessed or collected, or any penalty claimed to have been collected without authority, or for any sum which it is alleged was excessive, or in any manner wrongfully collected, shall be brought within two years next after the cause of action accrued, and not after; and all claims for the refunding of any internal tax or penalty shall be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued, and not after: *Provided*, That actions for claims, which have accrued prior to the passage of this act, shall be commenced in the courts or presented to the Commissioner of Internal Revenue within one year from the date of said passage: *And provided further*, That where a claim shall be pending before said Commissioner the claimant may bring his action within

> one year after such decision, and not after: *And provided further*, That no right of action barred by any statute now in force shall be revived by anything herein contained.

Section 3220 Revised Statutes (act of July 13, 1866, 14 Stats., 111), authorizes the Commissioner of Internal Revenue to refund taxes, penalties, etc., and is as follows:

> The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court for any internal taxes collected by him, with the costs and expenses of the suit. * * *

On page 104, Internal-Revenue Laws, 1900, we find the following quotation from the case of *Real Estate Savings Bank* v. *United States* (1880), 16 Court of Claims Rep., 335:

> It is a principle universally recognized and enforced in the courts of law that an action can not be maintained for the recovery back of money paid in the discharge of a tax illegally assessed, unless the payment was made *under protest*. But that principle has as uniformly been held by the Commissioner of Internal Revenue and other officers of the

> Department as altogether too technical and too exacting for application to the *refund of taxes under this section* (3220), and from the beginning no proof of protest has ever been required. (Id., 104 U. S., 728.)

Although the Commissioner of Internal Revenue may entertain *an application for refund* of taxes under section 3220, the question still remains as to whether, in order to lay the foundation for a suit against the United States to recover back taxes erroneously or illegally paid under section 3226 it would not still be necessary to file *a protest* at the time of the payment or to serve notice of suit for the recovery of the tax so paid.

(C.)

From a consideration of the foregoing provisions of the Federal Statutes relative to this subject, we maintain that a payment under protest or with notice of suit is a necessary prerequisite to the right of action on the part of the claimant against the Government for a recovery of the tax illegally assessed and collected.

From these provisions of the law we maintain that it is a necessary prerequisite to the maintenance of a suit against the United States for the recovery of a tax erroneously or illegally paid that some sort of a protest should be made at the time of payment, and that if it appears that the tax was voluntarily paid that there can be no right of recovery against the United States.

Section 3226 clearly presupposes such a protest, and appeal to the Commissioner of Internal Revenue. Section 3227 provides for a limitation of two years in which suit must be brought for such recovery, and section 3228 provides for a limitation of two years in which claims for a refundment might be made and receive the consideration of the Commissioner of Internal Revenue. In support of this proposition we refer to the uniform decisions of this court since the enactment of these laws, wherein it is asserted over and over again that in order to entitle the taxpayer to maintain a suit against the United States, or the collector, for the recovery of such a tax, it must appear that the tax was paid "under protest" or with "notice of suit."

In the case of *Cheatham et al.* v. *United States* (92 U. S., 85, 88), Mr. Justice Miller, in delivering the opinion of the court, in referring to section 3226 (14 Stat., 152), said:

> So also, in the internal-revenue department, the statute which we have copied *allows "appeals from the assessor" to the Commissioner of Internal Revenue;* and, if dissatisfied with his decision, on paying the tax the party can sue the collector; and, if the money was wrongfully exacted, the courts will give him relief by a judgment, which the United States pledges herself to pay.
>
> It will be readily conceded, from what we have here stated, that the Government has

> the right to prescribe the conditions on which it will subject itself to the judgment of the courts in the collection of its revenues.

In 1879 the case of *Wright* v. *Blakeslee* (101 U. S., 178) was decided. Mr. Justice Bradley, in delivering the opinion of the court, distinctly recognized the right of the Government under the law as it existed at that time, and which was the same as it is to-day, to require the payment to be made under protest in some form, in order to entitle the taxpayer to a recovery. The court said:

> On this point it is to be observed that the case stands on a different ground from that of the illegal exaction of duties on imports. To recover these, the statute makes it necessary that the party interested should give notice in writing to the collector, if dissatisfied with his decision, setting forth distinctly and specifically the grounds of his objection thereto. * * * *No such written notice or protest is required of a party* paying illegal taxes under the internal-revenue laws. *He must pay under protest in some form, it is true, or his payment will be deemed voluntary.* (*City of Philadelphia* v. *The Collector*, 5 Wall., 720; *The Collector* v. *Hubbard*, 12 id., 1.) But while a written protest would in all cases be most convenient, there is no statutory requirement that the protest shall be in writing. In the present case, the court merely finds that the payment of the tax and penalty *was made under protest, which may have been either written or verbal.*

It is clear from these decisions that there must be such a thing as a voluntary payment of an internal-revenue tax, and that a voluntary payment would defeat the right of the party making such payment to a recovery by suit. If there was ever a case of voluntary payment of an internal-revenue tax, such a case is presented by the record now before this court.

In the case of Schmitt et al. *v.* Trowbridge (Federal Cases, No. 12468), which was decided in 1878 in the district court for the eastern district of Michigan, Mr. Justice Brown, in charging the jury, said:

> This is an action against the collector of internal revenue of this district, and, in fact, against the Government through him as defendant, to recover certain taxes said to have been illegally assessed and collected upon 243 boxes of matches made by the plaintiffs. The law provides that, in all cases where the assessment is disputed, the amount of the tax shall be paid, *and upon protest being made and an appeal taken to the Commissioner of Internal Revenue*, in case his decision sustains the validity of the tax, a suit may be brought against the collector, and the case submitted to a jury. That is the only way which the law provides for the rehearing of assessments, so that in the end the validity of these assessments may always be submitted to a jury. I charge you, as requested by plaintiff in his first request, that the payment of the assessment

> in this case, and under the circumstances proved, is not to be considered *a voluntary one*. All that this request means is that where the assessment is illegally exacted *under protest*, and the appeal properly taken, the plaintiff may sue to recover it back.

So in the case at bar it was impossible to plead in the petition that "due protest" had been made at the time of the payment of the tax, because no such protest was made; and it was likewise impossible to allege that an "appeal" had been duly taken to the Commissioner of Internal Revenue, for the reason that there was nothing to appeal from. And so the pleader states (Record, p. 5) that the petitioner "made a written application" to the United States Commissioner of Internal Revenue.

In the case of *Stewart* v. *Barnes* (153 U. S., 456), which was a suit against a collector of internal revenue for the purpose of recovering an internal-revenue tax on distilled spirits alleged to have been unlawfully exacted, Mr. Justice Shiras, in delivering the opinion of the court, said (p. 459):

> No evidence was introduced to show the nature of the "protest made," but it was unnecessary to prove more than that the payment was made "under protest," which was admitted by the plea. (*Wright* v. *Blakeslee*, 101 U. S., 174.)

In the case of *Pollock* v. *Farmers' Loan and Trust Company* (157 U. S., 554), Mr. Chief Justice Fuller intimated, as I take it from that case, that there

might be such a thing as a voluntary payment of an internal-revenue tax, for which there could be no subsequent recovery, and thus sufficient grounds were afforded for the interference by a court of equity to restrain the company from voluntarily paying the tax. He said:

> The objection of adequate remedy at law was not raised below, nor is it now raised by appellees, if it could be entertained at all at this stage of the proceedings; and, so far as it was within the power of the Government to do so, the question of jurisdiction, for the purposes of the case, was explicitly waived on the argument. The relief sought was in respect of *voluntary action* by the defendant company, and not in respect of the assessment and collection themselves. Under these circumstances, we should not be justified in declining to proceed to judgment upon the merits.

Mr. Justice White, with whom concurred Mr. Justice Harlan, in his dissenting opinion in the first income tax case, said (157 U. S., p. 609):

> The decisions of this court hold that the collection of a tax levied by the Government of the United States will not be restrained by its courts. (*Cheatham* v. *United States*, 92 U. S., 85; *Snyder* v. *Marks*, 109 U. S., 189. See also *Elliott* v. *Swartwout*, 10 Pet., 137; *City of Philadelphia* v. *The Collector*, 5 Wall., 720; *Hornthall* v. *The Collector*, 9 Wall., 560.) The same authorities have established the

> rule that the proper course, in a case of illegal taxation, is *to pay the tax under protest or with notice of suit*, and then bring an action against the officer who collected it. The statute law of the United States, in express terms, gives a party who has paid a tax *under protest* the right to sue for its recovery. (Rev. Stats., sec. 3226.)

In the case at bar it does not appear from the petition that the tax was paid under "protest" or with "notice of suit." Can it, therefore, be maintained that without either of these prerequisites the taxpayer may make a voluntary payment to the collector with no more compulsion than that an unconstitutional law, as he claims, is upon the statute books requiring him to pay the tax, and after remaining silent for more than a year and a half thereafter apply to the collector of internal revenue at Washington for a refund of the money so paid, and upon that action predicate a suit against the Government under section 3226?

In the case of *Pacific Steam Whaling Company* v. *United States* (187 U. S., 447, 453) Mr. Justice Brewer, in delivering the opinion of the court, said:

> By the statute the clerk is made the collector of the license taxes, and if this tax was illegal and *paid under protest*, and nothing in this or other legislation of Congress restrict such an action, very likely under these authorities an action would lie against him for the money thus wrongfully taken from the petitioner.

In the case of *De Lima* v. *Bidwell* (182 U. S., 1, 179) Mr. Justice Brown, after a review of the cases, including the case of *Elliott* v. *Swartwout*, said:

> We are not impressed by the argument that if the plaintiffs insisted that these sugars were not imported merchandise they should have stood upon their rights, refused to enter the goods, and brought an action of replevin to recover their possession. It is true that to prevent the seizure of the sugars plaintiffs did enter them as imported merchandise, but any admission derivable from that fact is explained by *their protest against the exaction of duties* upon them as such. They waived nothing by taking this course. *The collector lost nothing, since he was apprised of the course they would probably take.*

The plaintiff in the case at bar, as I have reiterated again and again, made no protest; neither did he notify the collector that he would bring suit for the recovery of the taxes. In fact, the collector, so far as it appears from this petition, knew nothing of this claim until eighteen months after the money had been paid and covered into the Treasury of the United States. And if a taxpayer waived, or could waive, his right to recover a tax which he voluntarily paid, such a waiver is clearly established from the allegations contained in this petition. We have not been able to find a single case from among the many decisions of this court in which an internal-revenue tax voluntarily paid

without "protest" and without "notice of suit" has been recovered back in a suit against the collector or the United States.

CONCLUSION.

By way of conclusion it may be suggested that if the plaintiff in error can maintain this suit upon the facts alleged in his petition, that every person who has paid a tax of a like character to the Government within the past two years can maintain an action for the recovery of the moneys so paid after making an application to the Commissioner of Internal Revenue for refundment. Or, in other words, that the statute of limitations alone will protect the Government from a refundment of the tax, if it be made to appear that such tax was illegally or erroneously assessed and collected.

We respectfully submit that if this be the law that the carefully guarded language which we find running through the various decisions of this court with reference to "protest" and "notice of suit" at the time of payment and "compulsory payment" were mere idle, useless, and unnecessary dicta. We can not believe that the Government intended to waive such a necessary prerequisite, and we feel that the public interests require that we submit the question for the consideration of this Honorable Court.

II.

A tax imposed upon any deed or instrument in writing whereby the title to any real property is transferred from one person to another is an indirect tax in the nature of a duty or excise within the meaning of the Constitution.

Upon this proposition we respectfully submit for the consideration of the court certain portions of the Government's brief in the case of *George C. Thomas* v. *United States* (No. 43, October term, 1903), and which case was specially assigned for argument with this case.

The particular portions of the Government's brief in the Thomas case which we desire to have incorporated in and considered as a part of this brief are as follows:

Part I, pages 10 to 21, inclusive.
Part II, pages 22 to 32, inclusive.
Part III, pages 32 to 39, inclusive.
(A), pages 44 to 46.
(B), pages 49 to 51.
(C), pages 52 to 54.
(D), pages 54 to 57.
VI, pages 72 to 77.
Appendixes A, B, C, and D, pages 79 to 105.

It is believed that the above references to the Government's brief in the Thomas case contain all of the arguments, points, and authorities which are common to the two cases under consideration.

The case at bar, however, presents certain additional questions for consideration. We shall,

therefore, confine our discussion in the remaining portion of this brief to those questions which are alone peculiar to a tax upon a deed or instrument in writing for the conveyance of real property.

A.

A tax imposed upon a deed or instrument in writing whereby the title to real estate is transferred from one person to another does not fall within any of the species of taxation heretofore determined to be direct taxes within the meaning of the Constitution by the decisions of this court.

The income-tax cases are the authority for the assertion that there are at least five different and distinct classes of direct taxes within the meaning of the Constitution. If there be any other species of direct taxes, it has remained undiscovered, so far as the decisions of this court are concerned, for more than one hundred years. We shall, therefore, not attempt to demonstrate that from the very nature of things there does not exist, nor can there be created, any tax which might in the future be determined by this court to be a direct tax within the meaning of the Constitution, but we shall devote our attention, in the first place, to establishing to the satisfaction of this court the two following propositions:

First: That the tax here imposed does not fall within any of the classes of direct taxes heretofore recognized as such by the decisions of this court.

Second: That the tax here imposed is not a direct tax, but an indirect tax in the nature of a duty or excise.

(See pages 35 to 39, inclusive, of the Government's brief in the case of *Thomas* v. *United States*.)

A capitation tax, a tax upon personal property, and a tax upon the income from personal property, each of which has been held to be a direct tax within the meaning of the Constitution, may, without further discussion, be eliminated from consideration in this case, for the reason that no one would seriously contend that a tax upon the conveyance of real estate is in any manner analogous to or legally equivalent to any one of those classes of direct taxes.

We have remaining a tax upon real property and a tax upon the income from real property, which we will briefly examine for the purpose of demonstrating that a tax upon the sale or conveyance of real property is in no manner the legal equivalent of a tax upon real property, or a tax upon the income from real property.

In the case of *Knowlton* v. *Moore* (178 U. S., 41, 82), Mr. Justice White, in delivering the opinion of the court, took occasion to point out in unequivocal language the true scope and meaning of the income-tax cases, and after observing that "the constitutional meaning of the word direct was the matter decided," said:

> Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of prop-

> erty from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property; Secondly, that the tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned.

"A tax levied on a person solely because of his general ownership of real property" is easily differentiated and distinguished from a tax levied upon a person by reason of the sale or passing of the title to such real property from the owner to the purchaser. Such a tax surely can not be said to be levied upon one solely because of his general ownership of real property, nor are they legal equivalents in any sense of that expression. The land owner may hold and enjoy his real estate during his whole life, and upon his death his property may descend to his heirs, who may in turn hold and enjoy the property free from this particular tax. It is only when the land owner elects to enjoy one of the many incidents and rights of ownership, to wit: The sale of the property, that the tax accrues. But it may be said that the right to sell and dispose of real property is a natural right, and therefore differs very materially from

a mere license or privilege created and conferred upon the citizen under and by virtue of the laws of the various States. To this we reply that the power of Congress to tax is supreme, and that it is immaterial, so far as the taxing power of Congress is concerned, whether the subject of the tax be a natural right or a mere license or privilege conferred by statute, the only limitation being that if it be a direct tax it must be apportioned.

Having thus pointed out that a tax upon the sale or conveyance of real estate is in no manner the legal equivalent of a tax imposed on such real estate by reason of one's general ownership of such property, let us consider for a moment whether such a tax is the legal equivalent of a tax upon the income derived from the real property.

> The tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must apportioned. (*Knowlton* v. *Moore*, *supra*.)

If a tax upon the income derived from such real estate be the legal equivalent of a direct tax upon the real property from which the income was derived, and if a direct tax upon the real property is not the legal equivalent of a tax upon the sale of such real property, it must necessarily follow that a tax upon the sale of such real estate is not the legal equivalent of a tax upon the income from such real property.

A tax upon the sale of lands is a tax upon only one of the many rights and incidents peculiar to and necessarily connected with the ownership of real property, while a tax upon the land on account of one's general ownership thereof is manifestly a tax upon each and all of the many rights and incidents appertaining to the ownership of real property. The former tax can not be the legal equivalent of the latter tax for the reason that a part can never equal the whole. And if we apply the same reasoning to an income tax, the conclusion is the same. A tax levied upon the income from lands is necessarily a tax upon each and all of the many rights and incidents appertaining to the ownership of the lands, and, as was said by Mr. Justice White, "is the legal equivalent to a tax upon the lands." It follows, therefore, that such a tax is not the legal equivalent of a tax levied upon only one of the many rights and incidents necessarily connected with the ownership of the lands.

And again, this tax may be clearly distinguished from a general tax upon lands, and a tax upon the income or yield derived from lands. A tax upon lands by reason of one's general ownership of such lands operates upon all the rights and incidents connected with the lands, including the income or yield derived from the lands and the right of alienation, which may be considered as equivalent to alienation itself. You can not enjoy the

right of income or the right of alienation without having them subject to the tax imposed by reason of general ownership. The same is true concerning a tax upon incomes; such a tax operates upon each and every right and incident necessarily connected with the ownership of the lands, including the possession of the lands and the right of alienation. But a tax upon the sale of lands does not operate upon the lands generally—that is, upon the possession or the right to possession, nor upon the income or yield derived from the lands, for each of these rights may be enjoyed to the fullest extent and still the owner may be free from the burden of the tax upon the sale of lands. The right of sale is peculiarly different from the right of possession and the right of income in this, that the moment such right is exercised there is an immediate termination of all the rights pertaining to ownership. A tax imposed upon lands by reason of their general ownership, and a tax upon the income from such land, are taxes which are ever present and all embracing so far as the ownership of the land is concerned, while a tax upon the sale of lands does not in any manner interfere with the possession or enjoyment thereof, but only accrues upon the happening of the event of sale, which in itself absolutely terminates not only the right of possession and the right to the income, but all other rights and privileges arising from the ownership of lands, including of course the right to alienation itself.

From this process of reasoning we are forced to the inevitable conclusion that a tax upon a deed or instrument in writing whereby real property is conveyed from one person to another is not the legal equivalent of any one of the five species of taxation which have been decided by the income-tax cases to be direct taxes within the meaning of the Constitution.

It has been said by this court that taxation is "eminently practical," and that mere abstruse and subtle distinctions as to the particular nature of a specified tax will receive little consideration at the hands of this court for the purpose of placing it in a category which will render it invalid. As was said by Mr. Justice Peckham in *Nicol* v. *Ames* (173 U. S., 515):

> The commands of this Constitution in this, as in all other respects, must be obeyed; direct taxes must be apportioned, while indirect taxes must be uniform throughout the United States. But while yielding implicit obedience to these constitutional requirements, it is no part of the duty of this court to lessen, impede, or obstruct the exercise of the taxing power by merely abstruse and subtle distinctions as to the particular nature of a specified tax, where such distinction rests more upon the differing theories of political economists than upon the practical nature of the tax itself.
>
> In deciding upon the validity of a tax with reference to these requirements, no

> microscopic examination as to the purely economic or theoretical nature of the tax should be indulged in for the purpose of placing it in a category which would invalidate the tax. As a mere abstract, scientific, or economic problem, a particular tax might possibly be regarded as a direct tax, when as a practical matter pertaining to the actual operation of the tax it might quite plainly appear to be indirect. Under such circumstances, and while varying and disputable theories might be indulged as to the real nature of the tax, a court would not be justified, for the purpose of invalidating the tax, in placing it in a class different from that to which its practical results would consign it. Taxation is eminently practical, and is in fact brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy.

If we apply this language of Mr. Justice Peckham to the case here under consideration, we are forced to the conclusion that there is a "practical difference" between the tax here imposed and a tax imposed upon real estate by reason of one's general ownership of such property, and a tax imposed upon the income from such real estate.

It requires little or no argument to demonstrate that there is a "practical difference" between a tax imposed upon 160 acres of land by reason of one's general ownership of such property and a tax imposed upon the sale of such real estate; and that there is a like difference between a tax imposed upon the income from such real estate and the sale of the property from which the income is derived. "No microscopic examination as to the purely economic or theoretical nature of the tax should be indulged in for the purpose of placing it in a category which would invalidate the tax." The attempt has been made in this case to consider the tax here imposed "as a mere abstract, scientific, or economic problem" for the purpose of demonstrating that this particular tax might possibly be regarded as a direct tax, when, as a "practical matter" pertaining to the actual operation of the tax, it quite plainly appears that the tax is indirect.

We have, therefore, but one remaining question for determination, which is as to whether this particular tax can by any process of reasoning, as a new and independent proposition, be held to constitute a new species of direct taxation, and which during all of these years has remained undiscovered until the present day.

B.

Various theories upon which this law may be sustained as imposing an indirect tax, or a tax in the nature of a duty or excise.

(1)

The tax here imposed is an indirect tax within every definition of that term contained in the many decisions of this court and in the writings of the leading authors on the subject of political economy.

(See Government's brief in *Thomas* v. *United States*, pages 44 to 49.)

Tested by these definitions, the tax imposed by this law is an indirect tax, at least in the constitutional sense.

A tax upon the sale of real property can not be said to bear immediately upon the persons or parties to the transaction, nor upon the possession and enjoyment of their rights. The owner of the land is entitled to the free and undisputed possession thereof for all time to come, absolutely free from the operation of this law. He enjoys all the rights and privileges incident to his ownership of such land free from any tax. It is only upon the happening of an event or an exchange, to wit, the sale of the land, that the tax accrues, and in such event the law simply imposes a tax upon the deed or instrument in writing whereby the lands are conveyed, and either the seller or the buyer may pay the tax, wholly or in part, and the lands which are

the subject of the transaction pass unaffected to the purchaser. Consider for a moment the facts in this very case. If the stamp duty of $600 had not been paid by Chesebrough, the owner, or by the Chesebrough Building Company, the purchaser, there would be no question but that the deed would have passed the title to the property without the payment of the tax free and unincumbered from any lien. It is true that the plaintiff in error would have been liable to indictment and punishment for failure to obey the requirements of the law, but nevertheless the real property would have passed unaffected by the law from the plaintiff in error to the corporation.

While it is true that the law provides "that such instrument, document, or paper, if not properly stamped, shall not be competent evidence in any court," and "that such document or paper not being stamped according to law shall be deemed invalid and of no effect," the courts of last resort in the various States have frequently held that such provisions of the law are beyond the power of Congress to enact, and constitute an unwarranted interference in matters more or less exclusively under the control of the various States; and the mere fact that Congress has in this law attempted to render an unstamped deed invalid, is of little or no consequence in determining the constitutionality of the tax imposed. (*Small* v. *Slocumb*, 112 Ga., 279, 281; *Green* v. *Holway*, 101

Mass., 243; Cooley's Constitutional Limitations (7th ed.), 684.)

And again, this tax has the distinguishing characteristic of an indirect tax, in that it is paid voluntarily in this sense, that it may be avoided if the owner so desire by refraining from making the sale. There is no element of compulsion present; and, besides, the burden may be shifted, as before observed.

(2)

The tax here imposed is not a direct tax within the meaning of the Constitution, for the reason that it is impossible to apportion it among the several States according to population.

(See Government's brief in *Thomas* v. *United States*, pages 49 to 51, inclusive.)

(3.)

The tax here imposed may be sustained on the theory that it is a tax in the nature of a duty or excise upon transactions in business activity or forms of commercial dealing.

(See Government's brief in *Thomas* v. *United States*, pages 52 to 54, inclusive.)

If Congress has the power under the Constitution, as has been frequently asserted by the decisions of this court, to impose a tax upon a business, occupation, and the various forms of commercial dealings, it must necessarily follow that Congress may constitutionally tax one isolated transaction, which, taken with many such transac-

tions, in the aggregate constitute the business or occupation upon which a tax may be lawfully imposed.

Let us paraphrase the language of Judge Thomas, in the case of *George C. Thomas* v. *United States*, which is found on page 10 of the record in that case:

The buying and selling of lands, not by brokers alone, but by a large number of persons in every community who profess some other main vocation, is an occupation more or less constant. This has become a business, a vocation, and is amenable to Federal taxation as such. Such persons maybe could not be so well reached if the statute laid a gross duty in the form of a license tax on the individual trader in lands. But in any case Congress has the power to distribute such tax upon each item of business falling under the traffic. For, if it may lay a tax of $100 on the vocation of buying and selling lands, it may lay a tax on the sale of lands at a rate of so many cents for each hundred dollars sold. The principal that justifies an impost of $10 per annum on a baker, supports the right to lay a tax of a fraction of a mill on each loaf of his bread. The principle that underlies the power, and not the peculiar form of its exercise, is regarded. Therefore it is not an answer that the instance charged may have been the only transaction of the dealer. How many sales of lands are necessary to constitute the business of a dealer in lands—five, ten,

twenty, or one; and at what state of his sale will his business be sufficiently apparent to compel the trader to stamp his transactions? At what point in his business career does the statute become constitutional? The act of 1898, like that of 1862, provides for a tax on many and varied occupations. How many items of business may a person do under each vocation, and escape the tax? How many instances of sales must the Government show against a defendant to establish the validity of the statute as to him? A tax is laid upon retail venders of tobacco. May a person sell tobacco now and then without paying a tax? So a tax is placed upon the venders of liquor, but may a person escape compliance with this tax upon the plea that the transaction was his first, second, or some other in numerical order, and that he did not sell liquor for a business? Is the answer that the offender never did it before a defense against the charge of violating the revenue statute? If such be the law, a tax may not be placed upon the occupation, business, or selling of liquors, tobacco, or lands, or any other thing consumable or nonconsumable, except under the necessity, in case of attempted enforcement, of proving beyond a reasonable doubt that the vender had made sufficient sales, so that it may be inferred that it was his regular vocation, and that he was engaged uniformly in the business. In that case the statute would become valid or invalid as the jury might determine.

The law is that he shall not pursue a certain business without paying the tax, and if Congress may validly declare that it may declare that he shall not, untaxed, do any of the business acts that fall within the occupation. A person pursues a business or vocation whether or not he announces it as his profession. It is what he does, and not what he professes, that determines. It seems to be a political rather than a judicial function to determine what shall constitute a business.

(4.)

The law may also be defended on the theory that the tax imposed is in the nature of a stamp duty or excise upon the deed or contract of sale itself, referring only to the fact that the subject-matter of the sale must be real property as a basis or ground for classification.

(See Government's brief in *Thomas* v. *United States*, pages 54 to 57, inclusive.)

It is difficult to conceive of any inherent difference between a contract for the sale of personal property and a contract or deed for the conveyance of real property, so far as it affects the constitutional power of Congress to levy a tax upon either the one or the other.

(5.)

A tax of this character has never before been questioned, although a similar law was enforced during the period of the civil war.

Conveyance.—Deed, instrument, or writing, whereby any lands, tenements, or other

realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons by his, her, or their direction, when the consideration or value exceeds one hundred dollars and does not exceed five hundred dollars, fifty cents, etc. (Act of July 1, 1862, 12 Stat., 432, 481.)

(6)

A tax upon a deed or instrument in writing for the conveyance of real estate may be regarded as a tax upon the transmission of property inter vivos.

In the case of *Magoun* v. *Illinois Trust and Savings Bank* (170 U. S., 283, 288), Mr. Justice McKenna, in delivering the opinion of the court, said:

> It is not necessary to review these cases or state at length the reasoning by which they are supported. They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is a creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective State constitutions requiring uniformity and equality of taxation.

Mr. Justice White, in delivering the opinion of the court in *Knowlton* v. *Moore* (p. 56), after quoting the foregoing language from *Magoun* v. *Illinois Trust and Savings Bank*, said:

> Having ascertained the nature of death duties, the first question which arises is this: Can the Congress of the United States levy a tax of that character? The proposition that it can not rests upon the assumption that, since the transmission of property by death is exclusively subject to the regulating authority of the several States, therefore the levy by Congress of a tax on inheritances or legacies, in any form, *is beyond the power of Congress*, and is an interference by the National Government with a matter which falls alone within the reach of State legislation.

And again, on page 58, he says:

> All courts and all governments, however, as we have already shown, conceive that the transmission of property occasioned by death, although differing from the tax on property as such, is nevertheless *a usual subject of taxation*. Of course, in considering the power of Congress to *impose death duties*, *we eliminate all thought of a greater privilege to do so than exists as to any other form of taxation*, as the right to regulate successions is vested in the States and not in Congress.

From this language it is apparent that the power of Congress to impose death duties is no greater

than the power of Congress to tax any other object of taxation which may be in existence, whether it be persons, property, or the various rights and incidents appertaining to property. If, therefore, a sale of real estate may be taxed by Congress, wherein exists the fallacy of reasoning that such a tax may be considered as *being imposed upon the passing or transmission* of the property occasioned by the sale?

> It is not denied that, subject to a compliance with the limitations in the Constitution, the taxing power of Congress extends to all usual objects of taxation. Indeed, as was said in the license-tax cases (5 Wall., 462, 471), after referring to the limitations expressed in the Constitution, "Thus limited, and thus only, it (the taxing power of Congress) *reaches every subject*, and may be exercised at discretion." (*Knowlton* v. *Moore*, *supra*, p. 58.)

Thus we see that in the case of *Knowlton* v. *Moore* this court sustained the power of Congress to tax the transmission of property from the dead to the living upon the theory that the tax was imposed, not upon the right or privilege created under the laws of the various States, but upon the theory that the transmission of property occasioned by death was a usual subject of taxation, and that the taxing power of Congress reaches every subject and may be exercised at discretion.

And again, in the case of *Snyder* v. *Bettman* (190

U. S., 249, 252), Mr. Justice Brown, in delivering the opinion of the court, said:

> This case must be regarded as definitely establishing the doctrine that the power to tax inheritances does not arise solely from the power to regulate the descent of property, *but from the general authority to impose taxes upon all property within the jurisdiction of the taxing power.*

And again:

> If it be true that it is beyond the power of Congress to impose an inheritance tax because the descent of property is regulated by State statutes, it would be difficult to support its power to impose stamp taxes upon commercial and legal instruments, since the conveyance, regulation, and transmission of all property is governed by the laws of the several States. Particularly would this be so with reference to stamp duties imposed upon documents connected with the devolution of the property of a deceased person.

And Mr. Justice White, with whom concurred Mr. Chief Justice Fuller and Mr. Justice Peckham, in the dissenting opinion in *Snyder* v. *Bettman* (*supra*), said (p. 256):

> On the other hand, the right of the United States to levy an inheritance tax, which was upheld in *Knowlton* v. *Moore*, *was based solely upon the power of the United States to tax*, and that case therefore conveys no intimation that there is authority in the United States

> to levy an inheritance tax upon an object which it has no power under the Constitution to tax at all, either directly or indirectly. The distinction between the two—that is, between the broader power of a State resulting from its authority not only to tax, but also to regulate the transmission or receipt of property by death, *and the narrower power—that is, of taxation alone*, vested in the Government of the United States, was explicitly pointed out in *Knowlton* v. *Moore* (*supra*), at page 57.

The next question which arises is whether there be any real difference, so far as the direct and indirect character of the tax is concerned, between a tax upon the transmission of property from the dead to the living and a tax upon the transmission of property inter vivos.

The transmission of title in either case is a thing that exists, and is therefore within the range of the taxing power of Congress, and the mere fact that death duties have been regarded by all courts and all governments as usual subjects of taxation, while the transmission of property from the living to the living has not been so frequently the subject of taxation would seem to be immaterial. When the power of Congress to tax is challenged, we have only to refer to the Constitution, and if the object or thing taxed does not fall within the prohibitions contained in that instrument, the courts are powerless to limit the power of Congress in this respect to "usual subjects of taxation."

13975

In the case of *Knowlton* v. *Moore* it was held that a tax upon successions is within the power of Congress to impose, and that such a tax is not a direct tax but an indirect tax in the nature of a duty or excise.

Let us suppose that the Constitution of the United States contained a provision to the effect that upon the death of any person his property should descend to his heirs. Would not Congress under the taxing clause of the Constitution still have the power to impose a tax upon the transmission of such property from the dead to the living? In such a case the transmission of property from the dead to the living would stand on an equal footing with the transmission of property from the living to the living.

The idea here suggested has been well expressed by Judge Thomas in the case of *Thomas* v. *United States* (Record, p. 15):

> Thereupon it was demonstrated that an inheritance or legacy tax is laid upon the transmission of property. But what is "transmission" but the transfer of title by one person to another, vesting possession at the time when the enjoyment of the first holder or owner ceases by the termination of his life? If the donor effected the same distribution of his property in his lifetime, would not Congress have equal power to tax it? The assumed right of the Federal Government to lay death duties has no less remote basis than the highly theoretical and

> practically unknown power of the State government to seize and confiscate the property of an unoffending citizen who dies leaving heirs or donees. But the basic theory upon which such tax rests does not change the fact that it is imposed upon the transfer of the title of the property. The State has the power to regulate the use of property and to direct under what reasonable limitations sales thereof shall be made. As a basis of taxation this power inures to Congress quite as much as does the power to regulate successions. The conception that the State may theoretically confiscate property at the death of the owner, but may only regulate its use and sale during his life, points to a difference in degree of authority. The power of the State to regulate is a true and genuine dominion; it is constantly exercised; it furnishes some real basis for taxation; the power to appropriate a decedent's property is the merest speculation, which no civilized State would ever venture to use.

The idea of the learned judge seems to be that there is little difference, if any, between the right to transmit property at one's death to his heirs and the right to dispose of his property while living. It is a right which is recognized in every civilized state, and it is the merest fiction of law which regards such a right as only a privilege. We, therefore, contend that if Congress has the power to tax the transmission of property occasioned by death, that the same power exists in

13976

Congress to tax the transmission of property *inter vivos*. If a tax upon the transmission of property where death is the generating cause is an indirect tax in the nature of a duty or excise, it must be equally true that a tax upon the transmission of property where a contract is the generating cause is equally an indirect tax in the nature of a duty or excise.

CONCLUSION.

We maintain, in conclusion, that a tax imposed upon the sale of any certificate or share of stock in any corporation or association is similar in principle to a tax imposed upon the sale of produce or merchandise when made upon a board of trade or a stock exchange, for the reason that in either case the tax imposed operates directly upon the privilege or facility which is afforded the citizen under the laws of the various States to perform the particular act designated and selected by Congress to bear the burden of the tax imposed. And in the case at bar we are unable to draw any material distinction between a tax imposed upon the transmission of real property *inter vivos* and a tax imposed upon the transmission of real property in a case where death is the generating cause. And, while strictly speaking, such a tax may not be regarded as identical the one with the other, we are, nevertheless, forced to the conclusion that they are legal equivalents. The Congress has plenary power under the Constitution to tax "every subject," including the transmission of real property

when death is the generating cause and the transmission of real property when the volition of the owner is the generating cause. The fact that different causes produce like results is immaterial, and if the taxation of the *result* in one case be indirect taxation, the taxation of the *result* in the other case must equally be regarded as an indirect tax.

We do not recall a single decision of this court wherein the constitutional rule of apportionment has received favorable comment, though it has been frequently before this court for consideration and construction. Nor has the wisdom of the framers of the Constitution in inserting this provision in that instrument been successfully defended. This court is now urged to extend, by judicial construction, the application of that rule so as to embrace within this inhibition a tax upon the transmission of real property *inter vivos*. The Government, in the vigorous language of Mr. Justice Paterson, who was also one of the members of the Constitutional Convention, now appeals to this court to arrest by its decision in this case the further extension and application of this unjust and inequitable rule.

> On the part of the plaintiff in error it has been contended that the rule of apportionment is to be favored, rather than the rule of uniformity; and, of course, that the instrument is to receive such a construction as will extend the former and restrict the latter. I am not of that opinion. The Constitution has been considered as an accommodating

1397

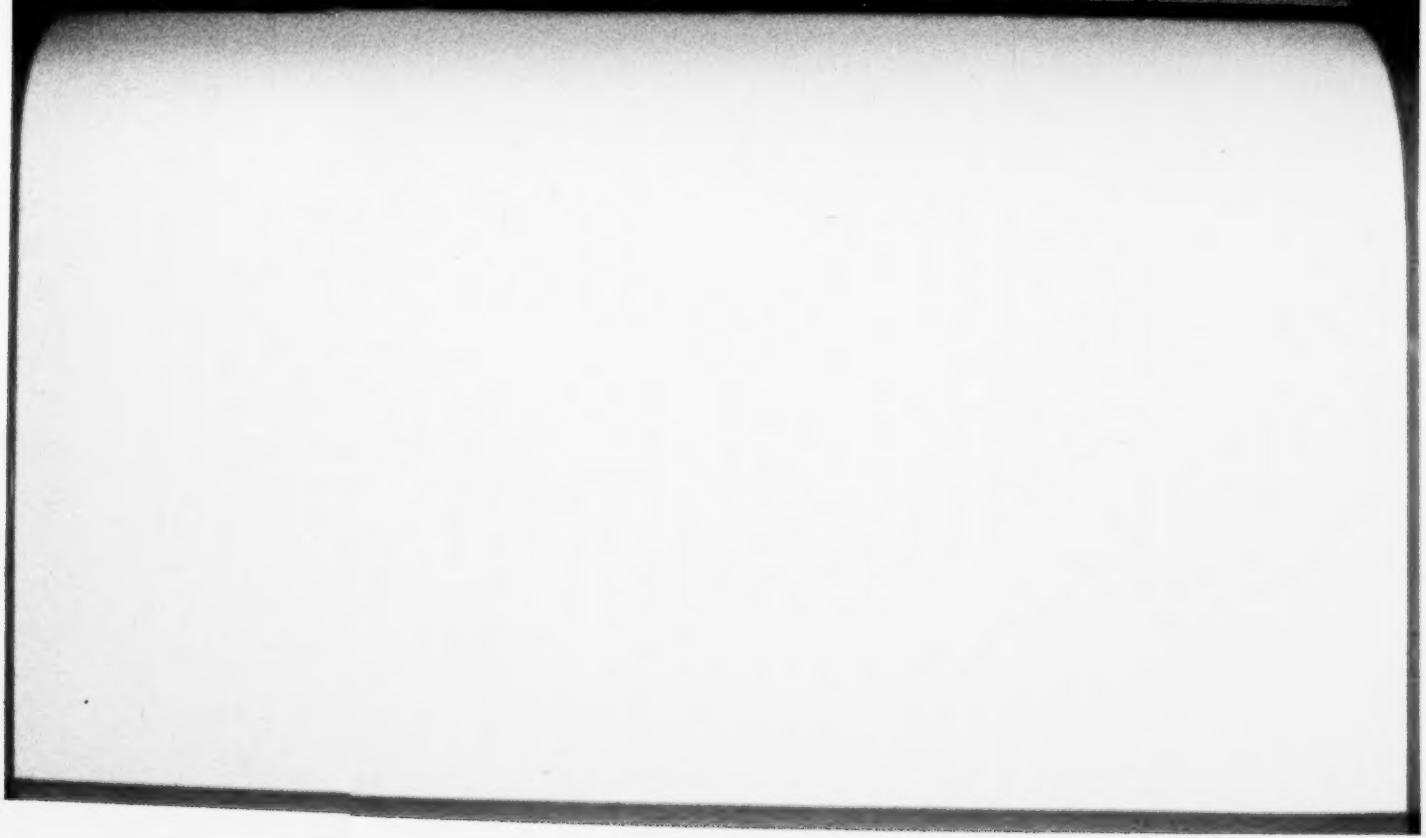
> system. It was the effect of mutual sacrifices and concessions; it was the work of compromise. The rule of apportionment is of this nature. *It is radically wrong; it can not be supported by any solid reasoning.* Why should slaves, who are a species of property, be represented more than any other property? The rule, therefore, ought not to be extended by construction.

We believe with Mr. Justice Paterson that the constitutional rule of apportionment is "radically wrong," and while the various branches of the Government are bound to recognize and yield "implicit obedience to this constitutional requirement," we maintain that it is no part of the duty of this court, except in cases free from doubt, to extend by judicial construction the application of this rule beyond the scope of the decisions heretofore rendered, and that the law here under consideration should not be placed in a category which will invalidate the tax simply because it may be demonstrated by "abstruse and subtle distinctions" of the "differing theories of political economists" to be in some respects analogous to a direct tax.

We therefore respectfully submit this case to this honorable court with the confident belief that the constitutional rule of apportionment will be held to be inapplicable to a tax imposed by Congress upon the transmission of real property *inter vivos*.

MILTON D. PURDY,
Assistant Attorney-General.

O



In the Supreme Court of the United States

OCTOBER TERM, 1903.

ROBERT A. CHEESEBOROUGH, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 182.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON THE QUESTION OF PEREMPTORY RULING.

[illegible]
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

ROBERT A. CHESEBROUGH, PLAINTIFF IN error,
v.
THE UNITED STATES.
No. 152.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON THE QUESTION OF VOLUNTARY PAYMENT.

It was suggested by counsel for the plaintiff in error on the argument, in reply to a question from the bench, that the $600 worth of stamps here in controversy were purchased by the petitioner from the collector of internal revenue for the second district of New York generally—that is, with no particular purpose in view at the time of such purchase. From the record in this case, however, it fairly appears that these particular documentary stamps were purchased by the petitioner from Charles H. Treat, the United States collector of internal revenue for the second district of New York, for the express purpose of affixing the same to the deed of conveyance which he was about to

execute to the Chesebrough Building Company. The allegations in the petition with reference to this matter are as follows:

> And that such law being in force the Chesebrough Building Company, as was known to petitioner, was unwilling to accept the said deed of conveyance unless and until petitioner had placed thereon the stamps required by the aforesaid act, and that petitioner under compulsion of said law, and in order to receive from the purchaser the shares of stock named as the consideration for such conveyance, and in order to entitle such deed to be recorded under the provisions of said act, and to be received as evidence in the Federal courts, as therein provided and in order to enable the petitioner to fulfill his aforesaid contract with said Chesebrough Building Company to make, execute, and deliver to said company a good and sufficient deed of conveyance of said real estate and premises, and in order to give to said company a good and clear title to said real estate and premises, free from doubt, did purchase from Charles H. Treat, the United States collector of internal revenue for the second district of New York, and place upon the said deed of conveyance stamps to the amount of six hundred dollars ($600), the proceeds of sale of which stamps your petitioner believes were thereupon by said collector paid over to the United States as required by law, and said moneys are now held by the United States. (Record, pp. 4 and 5.)

While this allegation of the direct purchase of the stamps from the collector of internal revenue for the specific purpose makes the case more favorable to the contention of the plaintiff in error than it would have been had he purchased the stamps from the collector generally, and for purposes confessedly legal under the law, we think there are, nevertheless, inherent reasons, which we shall briefly point out, why a tax even of this character must be paid under protest or with notice of suit.

NECESSITY FOR PROTEST.

I.

It was suggested upon the argument, by Mr. Justice Brown from the bench, as I recall, that ordinarily the object of requiring a protest or notice of suit was for the purpose of protecting the collector in case suit were instituted against him. This was undoubtedly one of the reasons for requiring a protest, but it seems to me that such reason has ceased to exist by virtue of the provisions contained in section 3220 of the Revised Statutes, which authorizes the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, and "*also to repay any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court*

for any internal taxes collected by him, with the costs and expenses of the suit."

It would seem, therefore, immaterial, so far as the collector is concerned, whether the payment was made under protest or with notice of suit, or made voluntarily, for if a judgment could be recovered against him in either case, he would be protected by the Commissioner under his power to refund to the collector as above provided. In other words, if notice of protest be required *solely* for the protection of the collector, it would seem, in view of the provisions contained in section 3220, to have been rendered unnecessary.

But there is a further question which suggests itself, which is, whether the protest or notice of suit can not be regarded as reasonably necessary for the protection of the Government.

II.

We maintain that protest or notice of suit at the time of payment is necessary, not as a protection to the collector but as a protection to the Government, in order that its officers may know with certainty that the particular money which is sought to be recovered was illegally collected from the taxpayer, and that a record may be made at the time of payment with the officer receiving the money as to the amount paid and the person from whom it was received, so that upon a subsequent appeal to the Commissioner of Internal Revenue he may know with certainty the person

to whom the tax could properly be refunded and paid back, if in his judgment such action were proper.

Such a requirement is surely not a hardship upon the payer of the tax, and besides would serve in many ways as a protection to the Government upon appeal to the Commissioner of Internal Revenue for refund of the tax. In such a case the Commissioner could refer to the official records of the collector's office and find that the amount claimed was actually paid to the United States, and stamps to such amount delivered to the claimant, and if the claimant were the proper person to whom the refund should be made, the Commissioner could act accordingly, whereas if a protest or notice of suit be disregarded a difficult question might arise as to the proper party to whom refund should be made. The law says (section 3220) that the Commissioner of Internal Revenue is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed *or collected*. If, therefore, this tax was legally *collected*, which would have been the case with stamps purchased for many other uses to which they might have been devoted, the collector would not be authorized under the law to remit or refund the same, and it would be impossible for the collector to know, or the Government to be apprised, of the purpose for which the tax was collected, unless some intimation or statement

to that effect were made at the time of the purchase. If the protest is made, however, and an appeal subsequently duly made to the Commissioner of Internal Revenue, it would be a very easy matter for the Commissioner to determine not only whether the tax was illegally collected, but also the party from whom the tax was collected, so that no mistake could be made as to the party who would be entitled to a refund from the Government.

It is easy to conceive that unless this be the law many frauds might be perpetrated upon the Government. Take, for example, this particular case. It may be that the $600 paid to the collector for the purchase of the stamps was as a matter of fact legally collected if at the time of purchasing the same Mr. Chesebrough intended to use them upon other instruments or documents which the law required to be stamped. It is difficult to conceive how any subsequent act on the part of the purchaser could render the collection of the money by the Government illegal which collection was perfectly legal at the time the money was paid. It is true that the petitioner alleges that he bought the stamps in question for this particular purpose, but the Government has no means of knowing that fact, nor can such fact be established or disproved except by the testimony of the purchaser himself. The simple requirement that he pay under protest or with notice of suit and advise the collector of the

purpose for which the stamps were purchased, while such action might be inconvenient, would surely result in no hardship upon the petitioner, and besides it would furnish positive contemporaneous evidence of the illegal character of the collection and assessment, and would likewise protect the Government, upon appeal made to the Commissioner, in making payment to the proper party.

And again, if payment under protest or with notice of suit be required as a condition precedent to maintaining a suit for its recovery, the Government would have the advantage which such notice would afford it in having the defect in the law called to the attention of its officers and an opportunity afforded for a reasonable amendment of the law as a future protection, at least, to its revenues.

III.

Another feature of this case which deserves consideration is the fact that section 25 of the war-revenue act of 1898 provided that collectors could sell and deliver stamps in quantities of not less than $100 of face value, with a discount of 1 per cent. This peculiar provision of the law resulted in people engaging in the business of buying and selling these stamps for profit, and of course resulted in the purchase of large quantities of these stamps from the Government with no particular purpose in mind as to the documents to which they were to be affixed. It would seem

unreasonable to say that a person purchasing stamps from a broker could subsequently claim the right to maintain a suit against the Government upon making an application to the Commissioner for a refundment upon the ground that the tax had been illegally assessed or collected by the United States.

It will also be noticed that section 3220, Revised Statutes, authorizes the Commissioner to refund and pay back all taxes erroneously or illegally *assessed or collected*. From the very nature of the tax under consideration it is not a tax that could be *assessed* by the collector, and if, as has already been pointed out, a party purchases stamps from the collector for a confessedly legal object the tax would be "legally collected," and the purchaser could not render the collection illegal by subsequently using the stamps for an object alleged to be illegal.

The plaintiff in error in this case elected to voluntarily pay the tax, and for the reason heretofore pointed out he should not now be permitted to maintain this suit. If he considered the law invalid at the time of the collection of the tax, the Government furnished him with ample means for properly raising that question by paying the tax under protest or with notice of suit, and then bringing an action to recover it back, either against the collector or the Government. If he failed to take such action, two other methods were open to

13983

him:—first, to pay the tax voluntarily and take his chances of securing a refund at the pleasure of the Government; second, to refuse to stamp the instrument, and subsequently raise the constitutionality of the law in either a civil or a criminal case, in which such point could properly be presented to the court for determination.

Respectfully submitted.

MILTON D. PURDY,
Assistant Attorney-General.

O

Supreme Court of the United States.

No. 152.—October Term, 1903.

Robert A. Chesebrough, Plaintiff in Error,
vs.
The United States.

In error to the District Court of the United States for the Southern District of New York.

[January 25, 1904.]

Robert A. Chesebrough filed his petition in the District Court of the United States for the Southern District of New York, May 23, 1902, to recover the sum of six hundred dollars from the United States alleged to have been paid to the collector of internal revenue for the second district of New York for the purchase of certain internal revenue stamps to be affixed to a deed for the conveyance of real estate. Petitioner alleged that on May 28, 1900, he entered into an agreement with the Chesebrough Building Company to convey to that corporation certain real estate which he then owned and to execute and deliver a deed therefor on the 5th day of June, 1900. That on that day he made, executed and delivered to the corporation a deed of conveyance of the real estate and received the consideration therefor. That at the time of the execution and delivery of the deed the act of Congress of June 13, 1898, "to provide ways and means to meet war expenditures, and for other purposes," was in force, which provided in part as follows:

"Sec. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule."

"Schedule A."

"Conveyance: Deed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value exceeds one hundred dollars and does not exceed five hundred dollars, fifty cents; and for each additional five hundred dollars or fractional part thereof in excess of five hundred dollars, fifty cents."

"Sec. 7. That if any person or persons shall make, sign, or issue, or cause to be made, signed, or issued, any instrument, document, or paper of

any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than one hundred dollars, at the discretion of the court, and such instrument, document, or paper, as aforesaid, shall not be competent evidence in any court."

The petition then averred that "the Chesebrough Building Company, as was known to petitioner, was unwilling to accept the said deed of conveyance unless and until petitioner had placed thereon the stamps required by the aforesaid act, and that petitioner under compulsion of said law, and in order to receive from the purchaser the shares of stock named as the consideration for such conveyance, and in order to entitle such deed to be recorded under the provisions of said act, and to be received as evidence in the Federal courts, as therein provided and in order to enable the petitioner to fulfill his aforesaid contract with said Chesebrough Building Company to make, execute and deliver to said company a good and sufficient deed of conveyance of said real estate and premises, and in order to give to said company a good and clear title to said real estate and premises, free from doubt, did purchase from Charles H. Treat, the United States collector of internal revenue for the second district of New York, and place upon the said deed of conveyance stamps to the amount of six hundred dollars ($600) the proceeds of sale of which stamps your petitioner believes were thereupon by said collector paid over to the United States as required by law, and said moneys are now held by the United States."

It was further averred that prior to the institution of the action and in pursuance of the laws of the United States and the regulations of the Treasury Department in that behalf, petitioner made a written application on January 9, 1902, to the United States Commissioner of Internal Revenue for the refunding of the amount so paid by him for stamps as aforesaid, which application was denied. Petitioner then charged that the act was unconstitutional and void, and prayed judgment. To this petition a demurrer was filed on behalf of the United States, assigning the ground that the petition did "not state facts which would constitute a claim on the part of the claimant against the United States." The demurrer was sustained and the petition dismissed, and this writ of error was thereupon allowed.

Sections 3220, 3226, 3227 and 3228 of the Revised Statutes are as follows:

"SEC. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in

any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal taxes collected by him, with the costs and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty: *Provided*, That where a second assessment is made in case of a list, statement, or return which in the opinion of the collector or deputy collector was false or fraudulent, or contained any understatement or undervaluation, such assessment shall not be remitted, nor shall taxes collected under such assessment be refunded, or paid back, unless it is proved that said list, statement, or return was not false or fraudulent, and did not contain any understatement or undervaluation."

"SEC. 3226. No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of [the] Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein: *Provided*, That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the Commissioner at any time within the period limited in the next section.

"SEC. 3227. No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued: *Provided*, That actions for such claims which accrued prior to June six, eighteen hundred and seventy-two, may be brought within one year from said date; and that where any such claim was pending before the Commissioner, as provided in the preceding section, an action thereon may be brought within one year after such decision and not after. But no right of action which was already barred by any statute on the said date shall be revived by this section.

"SEC. 3228. All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued: *Provided*, That claims which accrued prior to June six, eighteen hundred and seventy-two, may be presented to the Commissioner at any time within one year from said date. But nothing in this section shall be construed to revive any right of action which was already barred by any statute on that date."

Mr. Chief Justice FULLER delivered the opinion of the Court:

The rule is firmly established that taxes voluntarily paid cannot be recovered back, and payments with knowledge and without compulsion are volun-

tary. At the same time, when taxes are paid under protest that they are being illegally exacted, or with notice that the payer contends that they are illegal and intends to institute suit to compel their repayment, a recovery in such a suit may, on occasion, be had, although generally speaking, even a protest or notice will not avail if the payment be made voluntarily, with full knowledge of all the circumstances, and without any coercion by the actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no other means of immediate relief than such payment. *Little* v. *Bowers*, 134 U. S. 547, 554; *Railroad Company* v. *Commissioners*, 98 U. S. 541, 544; *Radich* v. *Hutchins*, 95 U. S. 210, citing *Brumagim* v. *Tillinghast*, 18 Cal. 265, a case in respect of stamps purchased, in which the subject is discussed by Mr. Justice Field, then Chief Justice of California.

In *Railroad Company* v. *Commissioners*, Mr. Chief Justice Waite, speaking for the court said:

"There are, no doubt, cases to be found in which the language of the court, if separated from the facts of the particular case under consideration, would seem to imply that a protest alone was sufficient to show that the payment was not voluntary; but on examination it will be found that the protest was used to give effect to the other attending circumstances. Thus, in *Elliott* v. *Swartwout*, 10 Pet. 137, and *Bond* v. *Hoyt*, 13 Id. 266, which were customs cases, the payments were made to release goods held for duties on imports; and the protest became necessary, in order to show that the legality of the demand was not admitted when the payment was made. The recovery rested upon the fact that the payment was made to release property from detention, and the protest saved the rights which grew out of that fact. In *Philadelphia* v. *Collector*, 5 Wall. 730, and *Collector* v. *Hubbard*, 12 Id. 13, which were internal revenue tax cases, the actions were sustained 'upon the ground that the several provisions in the internal revenue acts referred to warranted the conclusion as a necessary implication that Congress intended to give the taxpayer such remedy.' It is so expressly stated in the last case, p. 14. As the case of *Erskine* v. *Van Arsdale*, 15 Id. 75, followed these, and was of the same general character, it is to be presumed that it was put upon the same ground. In such cases the protest plays the same part it does in customs cases, and gives notice that the payment is not to be considered as admitting the right to make the demand."

The stamps in question were purchased from the collector of internal revenue for the Second District of New York, for the purpose of affixing them to a deed of conveyance to the Building Company, but the collector was not informed at the time of the purchase of the particular purpose, and no intimation was given him, written or oral, that petitioner claimed that the law requiring such stamps was unconstitutional and that he was making the purchase under duress. The petition did allege that the Building Company was unwilling to accept an unstamped conveyance and that the stamps were thereupon affixed in order to complete the transaction and ob-

tain the consideration, but if that constituted duress as between Chesebrough and his building company it was a matter with which the collector had nothing to do. On the face of the petition the purchase was purely voluntary and made under mutual mistake of law if the law were unconstitutional. But it is said that protest or notice would have made this payment involuntary, and that because something over nineteen months after the payment petitioner made "a written application" to the Commissioner of Internal Revenue for the amount he had paid for the stamps, the ordinary rule did not apply, inasmuch as such an application was "the statutory equivalent of a common law protest or notice of suit."

The reference is to section 3220 of the Revised Statutes, which provides that the Commissioner of Internal Revenue, on appeal to him, may remit, refund and pay back all taxes erroneously or illegally assessed or collected, or that appear to have been unjustly assessed or excessive in amount, or in any manner wrongfully collected; and also "repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal taxes collected by him, with the costs and expenses of suit;" while sections 3226, 3227 and 3228 provide that no suit shall be maintained for the recovery of internal taxes alleged to have been erroneously or illegally assessed or collected "until appeal shall have been duly made to the Commissioner of the Internal Revenue;" or unless brought within two years after the cause of action accrued; and that the claim for refunding shall be presented to the Commissioner within two years.

The words "until appeal shall have been duly made," appear to us to imply an adverse decision by the collector, at least a compelled payment, or official demand for payment, from which the appeal is taken.

In *Stewart* v. *Barnes*, 153 U. S. 456, this court treated the language as providing for "an appeal," and we think correctly. The opinion considered section 19 of the act of July 13, 1866, 14 Stat. 152, c. 184, carried forward into section 3226, and section 44 of the act of June 5, 1872, 17 Stat. 257, c. 315, from which sections 3227 and 3228 were drawn. We give them in the margin.*

This petition did not set up any ruling of the collector, either specific or resulting from a demand to which petitioner yielded under protest or with

---

*Sec. 19, Act of July 13, 1866:

"SEC. 19. *And be it further enacted*, That no suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected until appeal shall have been duly made to the Commissioner of Internal Revenue according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of said Commissioner shall be had thereon, unless such suit shall be brought within six months from the time of said decision or within six months from the time this act takes effect: *Provided*, That if said decision shall be delayed

notice, and from which he appealed to the Commissioner, but averred that he "made a written application" to the Commissioner to refund the amount he had paid.

We do not say that this was not sufficient to justify action by the Commissioner, but the averment as it stands is not equivalent to stating a previous adverse decision appealed from. The inference is that the application was a mere afterthought, and if an afterthought, the payment was voluntary.

The Commissioner might nevertheless have allowed the claim, and doubtless would have done so, in the interest of justice, if there were no particular circumstances to discredit it, and the law had been held unconstitutional by this court. But he rejected it, and petitioner was remitted to his suit in no different plight so far as his cause of action was concerned than if he had not sought the Commissioner at all.

In *United States* v. *Savings Bank*, 104 U. S. 728, it was held that the allowance of a claim by the Commissioner was equivalent to an account stated between private parties and binding on the United States until impeached for fraud or mistake, and that if not paid on proper application through the accounting officers of the Treasury Department, an action might be maintained on it in the Court of Claims, while if the claim were rejected, an action might be prosecuted against the collector. It was not, however, ruled that in the latter situation a recovery could be had if the original payment had been voluntary and without objection.

It is one thing for the Government to correct mistakes, return overcharges, or refund amounts exacted without authority, when satisfied such action is due to justice, and quite another thing for the Government to be compelled to repay amounts which in its view have been lawfully collected.

---

more than six months from the date of such appeal then said suit may be brought at any time within twelve months from the date of such appeal."

Sec. 44, Act of June 5, 1872:

"SEC. 44. That all suits and proceedings for the recovery of any internal tax alleged to have been erroneously assessed or collected, or any penalty claimed to have been collected without authority, or for any sum which it is alleged was excessive, or in any manner wrongfully collected, shall be brought within two years next after the cause of action accrued, and not after; and all claims for the refunding of any internal tax or penalty shall be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued, and not after: *Provided*, That actions for claims, which have accrued prior to the passage of this act, shall be commenced in the courts or presented to the Commissioner of Internal Revenue within one year from the date of said passage: *And provided further*, That where a claim shall be pending before said Commissioner the claimant may bring his action within one year after such decision, and not after: *And provided further*, That no right of action barred by any statute now in force shall be revived by anything herein contained."

By section 3220 authority is given and opportunity afforded to do what justice and right are found to require, and the conditions which govern contested litigation may well be regarded as waived, but it does not follow that there is any statutory waiver of such conditions when the Government is proceeded against *in invitum*.

As we have said the purchase of these stamps was purely voluntary, and if, notwithstanding, recovery could be had, it could only be on protest or notice, and there was none such here, written or verbal, formal or informal.

It is argued that the provision of section 3220 for the repayment of judgments against the collector rendered protest or notice unnecessary for his protection, but it was clearly demanded for the protection of the Government in conducting the extensive business of dealing in stamps, which were sold and delivered in quantities, and without it there would not be the slightest vestige of involuntary payment in transactions like that under consideration. And we find no right of recovery, expressly or by necessary implication, conferred by statute, in such circumstances.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.